Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DANIEL LEE MERRILL, SR.,
Petitioner,

v.

BURKE E. PORTER MACHINERY COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the *McDonnell Douglas* burden-shifting framework, outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), should be modified to account for discriminatory discharges occurring during a Reduction in Force ("RIF").

2. Whether the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, ("ADA") requires that the complained of discrimination be the "sole" cause or only a motivating cause of the adverse employment action.

3. Whether a plaintiff's ability to "interact with" co-workers constitutes a "major life activity" for purposes of sustaining a claim under the ADA.

PARTIES TO THE PROCEEDINGS

Petitioner, Daniel Lee Merrill, Sr., was Plaintiff in the District Court and Appellant in the Court of Appeals for the Sixth Circuit. Defendant, Burke E. Porter Machinery Co. ("BEPCO"), was the Defendant in the District Court and Appellee in the Court of Appeals for the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Daniel Lee Merrill, Sr., an individual, petitions this Court for a Writ of Certiorari to review the Judgment of the Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the panel of the Court of Appeals for the Sixth Circuit (Circuit Judges Siler and Sutton, and Judge Sharp sitting by designation) is not published, but is reported at 159 Fed. Appx. 676 (6th Cir. 2005). It is reprinted in the Appendix to this Petition ("App.") at 3a. The Order denying Plaintiff's Petition for Rehearing *En Banc* is not reported and is also reprinted at App. 1a. The Opinion of the District Court (U.S. Magistrate Judge Joseph G. Scoville) granting Defendant's Motion for Summary Judgment is not reported and is reprinted at App. 11a.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on December 14, 2005. An Order denying a Petition for Rehearing *En Banc* by the Court of Appeals for the Sixth Circuit was entered on March 9, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The stated purpose of the Americans with Disabilities Act ("ADA") is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title I of the ADA, which applies to the private sector, prohibits

discrimination against individuals with qualifying disabilities as follows:

> No covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual in regard to job application procedures, the hiring, advancement, *or discharge of employees*, employee compensation, job training, and other terms, conditions, and privileges of employment.

Id. § 12112(a) (emphasis added).

STATEMENT OF THE CASE

Daniel Lee Merrill, Sr. ("Plaintiff Merrill") suffers from Asperger's syndrome. His employer, Burke E. Porter Machinery Co. ("BEPCO"), fired him because of his disability. Asperger's is a form of high-functioning autism. In very broad terms, individuals with Asperger's have normal or above average intellectual capacity, with atypical or poorly developed social skills.

With the help of accommodating supervisors during the early part of his five years of employment, Plaintiff Merrill functioned successfully as a non-degreed engineer for Defendant, receiving good reviews and pay increases for a number of years. The trouble for Plaintiff Merrill began, however, when he was assigned a new supervisor, Ralph Palmer. Once Mr. Palmer learned of Plaintiff Merrill's condition, Plaintiff Merrill no longer received accommodations for his disability. Instead, Mr. Palmer became hypercritical of Plaintiff Merrill, which culminated in an incident whereby Mr. Palmer yelled and cursed at Plaintiff Merrill and then fired him for "insubordination."

Importantly, during the time of Plaintiff Merrill's improper termination, Defendant BEPCO laid off a number of other employees due to a reduction in force (RIF). Because of that RIF, no replacement was hired to fill Plaintiff Merrill's position. As such, he was unable to prove his prima facie case because the U.S. District Court for the Western District of Michigan and the Sixth Circuit Court of Appeals strictly construed this Court's seminal *McDonnell Douglas* test and required that Plaintiff Merrill actually show that he was replaced by someone who was not in his protected classification (i.e., someone who was not disabled). *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Such a strict construction of the *McDonnell Douglas* test, however, directly conflicts with this honorable Court's prior decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 310 (1996), in which this Court held that a prima facie case under *McDonnell Douglas* requires that there be: (1) at least a logical connection between each element of the prima facie case and the illegal discrimination, and (2) evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion.

The case at bar presents this Court with the unique opportunity to resolve a split of authority among the Circuit Courts of Appeals on at least three legal issues under the ADA: (1) whether the *McDonnell Douglas* test should be modified in the RIF context, (2) whether the ADA requires that the complained of discrimination be the "sole cause" or only a "motivating cause" of the adverse employment action, and (3) whether one's ability to interact with co-workers is a major life activity under the ADA. The case at bar also empowers this Court to rectify the decision made by the Sixth Circuit that is in direct conflict with: (1) its own judicial panels, (2) with the majority of its sister Circuits, and (3) with this Court's own precedent. Under current Sixth Circuit law,

individuals who are discriminatorily discharged during a RIF, and who do not have direct evidence of discrimination, have no recourse under the ADA. Plaintiff Merrill notes that this case is particularly important and timely considering the recent history of and proclivity toward economic cutbacks mandated by companies across the nation.

By way of more background, Defendant BEPCO, a company that designs and manufactures large specialized machines, hired Plaintiff Merrill as a mechanical project engineer in May 1997. Upon his hire, Plaintiff Merrill reported to mechanical engineering manager, Tim Leep. When Plaintiff Merrill would become stressed, Mr. Leep would allow him to walk around the building, leave work early, work at home, and arrive at work early in the morning when there were fewer distractions. This arrangement worked very well for Plaintiff Merrill, and he received good reviews and pay increases while Mr. Leep supervised him.

In May 2000, Plaintiff Merrill's psychologist officially diagnosed him with Asperger's syndrome, a condition that causes, among other things, avoidance of eye contact. Plaintiff Merrill undertook a counseling regimen for his disability with psychologist Gailord Weeks, who testified that Plaintiff Merrill experienced problems with interpersonal behavior and eye contact, behaviors which are common symptoms of Asperger's and which affect one's ability to interact with others.

In November 2000, Plaintiff Merrill met with Human Resources Manager Diane Roodvoets and his new engineering manager, Ralph Palmer. During that meeting, Mr. Palmer learned, for the first time, that Plaintiff Merrill suffered from Asperger's syndrome. Thereafter, Mr. Palmer treated Plaintiff Merrill very differently. He refused to talk to

Plaintiff Merrill in his office. He repeatedly chastised Plaintiff and called him "stupid." Mr. Palmer also told Plaintiff Merrill "you're not special and you won't be treated special."

For a brief period of time, from December 2000 to April 2001, Plaintiff Merrill was transferred to another supervisor. But when that supervisor moved to a different department, Mr. Palmer started supervising Plaintiff Merrill again. And, when Mr. Palmer asked why Plaintiff Merrill did not redesign a certain machine as asked, Mr. Palmer said, "What the hell is wrong with you?"

On June 8, 2001, the day Plaintiff Merrill was fired, Mr. Palmer reprimanded Plaintiff for making a mistake on a drawing. Although Plaintiff Merrill did not raise his voice, Mr. Palmer became exceedingly angry. Mr. Palmer said that Plaintiff Merrill was "technically incompetent" and could not "draw worth a shit." When Plaintiff Merrill (remaining calm as Mr. Palmer admits) told Mr. Palmer he was out of line, Mr. Palmer screamed, "I can drag your f*** ass out the door any time I f*** want to." Mr. Palmer continued in the same vein, saying: "I can drag you out of this building and pack your shit for you and deliver it to your car. Do you want to go?" Palmer repeated this last question numerous times, cursing loudly and in a threatening manner. Mr. Palmer later claimed that he couldn't get Plaintiff Merrill to respond to him, and he ultimately told Plaintiff Merrill: "Your ass is out of here." Palmer then escorted Merrill to the Human Resources office and out of the building, officially terminating Plaintiff Merrill's employment at BEPCO. Defendant did not replace Plaintiff Merrill, as during this time, Defendant also

laid off a number of other employees due to a reduction in force (RIF).[1] (App. 63a).

At a review meeting a few days later, Mr. Palmer claimed he fired Plaintiff Merrill because "[h]e would not hold eye contact when I speak to him. That means he cannot be trusted. Also, he was making funny faces at me when I was reprimanding him, and that is insubordination in my book." Plaintiff Merrill responded to Mr. Palmer's position by saying, "[t]hat's part of my disability. You can't hold that against me." Defendant BEPCO maintained that Plaintiff Merrill was fired for poor performance.

Plaintiff Merrill filed suit under the Americans with Disabilities Act on September 13, 2002, in the U.S. District Court for the Western District of Michigan. Defendant BEPCO filed a Motion for Summary Judgment. The parties stipulated to have the motion decided by U.S. Magistrate Judge Joseph G. Scoville, who granted Defendant's motion.

Noting that Plaintiff Merrill did not present direct evidence of discrimination, the District Court applied the *McDonnell Douglas* burden-shifting framework, holding that a prima facie case of discrimination under applicable Sixth Circuit law required that a plaintiff prove that "the position remained open while the employer sought other applicants or the disabled individual was replaced." (App. 119a). Because undisputed evidence existed that he was never replaced, the District Court determined that Plaintiff Merrill could not sustain a prima facie case of discrimination. (App. 119a-

[1] The District Court recited, in detail, the facts of this case. *See,* Appendix 15a-63a. The Sixth Circuit Court of Appeals provides a summary background of this case. *See,* Appendix 4a-6a.

120a), relying on *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1185 (6th Cir. 1996).

The District Court also ruled that Plaintiff Merrill's "insubordinate" comments were enough of a reason for his termination. In reaching this conclusion, the District Court applied Sixth Circuit Court of Appeal's precedent that required a plaintiff to show that the discrimination was the "sole cause" of Plaintiff Merrill's discharge. (App. 120a).

Another disputed issue in Defendant's Motion was whether Plaintiff Merrill's inability to interact with others substantially limited him in his ability to work. The District Court erroneously recast the ability to "interact with" others as the ability to "get along with" others. (App. 83a). The District Court recognized that a split among the Circuits existed about whether "the ability to get along with co-workers constitutes a major life activity within the meaning of the ADA." (App. 83a-84a). The U.S. Magistrate Judge even analyzed a First Circuit opinion on this issue, but he ultimately failed to distinguish between the ability to "interact" with others and the ability to "get along with" others, concluding that: "Plaintiff's purported inability to get along with co-workers is not a 'major life activity' within the meaning of the ADA." (App. 85a).

Plaintiff Merrill timely appealed the District Court's decision to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the decision of the District Court, holding that Plaintiff Merrill's failure to satisfy the replacement prong of the *McDonnell Douglas* test was "fatal" to his case (App. 10a n.2), even though the case involved a RIF in which employees are not normally replaced. Notably, in his appeal brief, Plaintiff Merrill relied on several cases to support the application of a modified *McDonnell Douglas* test, including

Kline v. TVA, 128 F.3d 337, 348-349 (6th Cir. 1997) (a plaintiff may establish discrimination either by introducing direct evidence of discrimination or by proving inferential and circumstantial evidence which would support an inference of discrimination) and *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1248 (6th Cir. 1995) ("a plaintiff may establish a prima facie case of discrimination either by presenting direct evidence of intentional discrimination by the defendant, or by showing the existence of facts which create an inference of discrimination." (internal citations omitted)).[2] The Sixth Circuit ruled that even if support existed for Plaintiff Merrill's argument for a modified *McDonnell Douglas* test, such a conclusion "would be inconsistent with the case law of this circuit." (App. 9a-10a).

Because it ruled that Plaintiff Merrill failed to establish a prima facie case of disability discrimination, pursuant to a strict construction of the *McDonnell Douglas* test, the Sixth Circuit did not opine upon whether the disability discrimination had to be the "sole cause" or just a motivating cause of the adverse employment action or whether the ability to "interact with" others constituted a "major life activity" for purposes of a claim under the ADA. (App. 10a n. 2).

The case at bar provides this Court with the opportunity to establish and clarify certain legal standards applicable to discriminatory discharge claims under the ADA as well as under other anti-discrimination statutes. As will be evident by

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[2] In his Petition for Rehearing En Banc, Plaintiff Merrill also cited several more cases to support his argument, including this Court's decision in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (U.S. 1977), in which this Court held that a prima facie case requires "evidence adequate to create an inference." *(Plaintiff's Petition for Rehearing En Banc, at 9)*.

the following discussion, the Circuits are hopelessly split on how to apply the *McDonnell Douglas* test in discriminatory discharge cases involving RIFs. They are also split on whether the ADA requires that the complained of discrimination be the "sole cause" or just a motivating cause of the adverse action. Further, the Circuits are split on whether one's ability to interact with others is a major life activity for purposes of the ADA.

In this context, this matter is now presented to the United States Supreme Court. This case satisfies all three of the significant reasons for granting a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This is precisely the type of case that requires review. Indeed, it is a textbook case for the issuance of a Writ of Certiorari. This case presents all three of the most important grounds for granting review by this Court: (1) the decision below has created several further conflicts among the Circuits; (2) the decision is in conflict with this Court's own precedent; and (3) the case plainly presents significant issues of nationwide importance. All together, these grounds present a compelling case for certiorari.

I. THE CONFLICTS IN THE CIRCUITS

The Circuit Courts of Appeals are irreconcilably conflicted on at least three issues that are present in this case. First, the Circuits are split on how the *McDonnell Douglas* test should be applied in Reduction in Force (RIF) situations. This particular conflict is at least a three-way split among the Circuits, and, further, there is a split among the panels of the Sixth Circuit Court of Appeals. Second, the Circuits are split on the correct interpretation and application of the terms

"because of" in 42 U.S.C. §12112(a) (see the text above). Several Circuits, including the Sixth Circuit from which Plaintiff Merrill is appealing, have ruled that the complained of discrimination must be ***the sole*** cause of the adverse employment action. In direct contrast, the majority of other Circuits only require that the complained of discrimination be a motivating cause of the employment action. Such conflicting interpretation of the "because of" language by the Circuits has created an unresolved conflict about when and how the ADA will operate to bar discrimination. Third, a split of authority exists about whether one's ability to interact with co-workers constitutes "a major life activity" for purposes of the ADA. Although most Circuits have studiously avoided resolution on this issue (sometimes quite intently), those Circuits that addressed this issue just do not agree. Each of the three "direct conflict" issues will be addressed in more detail below.

A. Split of Authority on the *McDonnell Douglas* Test in RIFs

The split of authority on this issue arises when a plaintiff claims discriminatory discharge during a time when the employer is reducing its workforce. As this Court well knows, when no direct evidence of discrimination exists (which is typically the case), a plaintiff must proceed under burden-shifting framework set forth in this Court's seminal case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Interpretative case law involving discriminatory discharge provides that the last prong of that test requires that a plaintiff claiming discrimination must show that the employer hired a replacement for the position that is outside the protected classification. *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1185 (6th Cir. 1996) (citing *McDonnell Douglas*, 411 U.S. at 802). However, as some Circuits have

recognized, this "replacement" requirement of the *McDonnell Douglas* test is untenable in a RIF situation. That is because, in a RIF, an employer is intentionally reducing its workforce due to economic conditions, and not replacing the discharged or laid off workers due to cost. Recognizing that RIFs are becoming more prevalent in America's current economy, some Circuits have modified or eliminated the "replacement" prong of the *McDonnell Douglas* test. In the case at bar, however, the Sixth Circuit applied a rigid construction of the *McDonnell Douglas* replacement requirement, holding that Plaintiff Merrill's failure to show he was replaced was "fatal" to his claim (App.10a n.2). The Circuits are now irreconcilably divided about the proper application of *McDonnell Douglas* test in the RIF context.

Without a doubt, therefore, the RIF variable in discriminatory discharge cases has created a chasm between the Circuits. Some Circuits, as the Sixth Circuit did in this case, strictly apply the *McDonnell Douglas* "replacement" prong, thus requiring that a RIF plaintiff show he was actually replaced by a person outside the protected classification, even though the employer is clearly not hiring replacements because of economic or other business conditions. Other Circuits have recognized that an employer could discriminate with impunity in a RIF if the replacement prong is strictly applied in such a context and, therefore, have modified the "replacement" prong of the *McDonnell Douglas* test.

Thus, the issue in conflict among the Circuits - and one begging for resolution - is whether the "replacement" prong of the *McDonnell Douglas* test should be strictly applied in discriminatory discharge cases involving RIFs or whether a modified *McDonnell Douglas* test should be applied. The effect of the inconsistent application by the Circuits of the replacement prong of *McDonnell Douglas* test in RIFs has led

to incongruous results because of an inconsistent application of the law.

Importantly, this Court has already recognized that the replacement requirement is not an absolute requirement for all cases of alleged illegal discrimination. In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 310 (1996), this Court held that the replacement element of the *McDonnell Douglas* test was inapplicable to that particular ADEA discriminatory discharge case, stating: "Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case." *Id.* at 312. In *O'Connor*, this Court also held that a prima facie case of discrimination requires a showing of at least some logical connection between each element of the prima facie case and the illegal discrimination and that a plaintiff must present evidence adequate to create an inference that an employment decision was based on a discriminatory criterion. Because the replacement requirement was simply not probative, it was not strictly employed.

The use of a modified *McDonnell Douglas* test has been acknowledged by some of the Circuit Courts. For example, in *Mitchell v. Data General Corp.*, 12 F.3d 1310 (1993), the Fourth Circuit adapted the *McDonnell Douglas* test to account for a RIF in an ADEA age discrimination case. The Fourth Circuit held that when discharged employees were not replaced because of a RIF, the replacement requirement was meaningless. *Mitchell*, 12 F.3d at 1315. The Fourth Circuit determined that the question was "not why members of the group were discharged or whether they were meeting performance expectations, *but whether the particular employees were selected for inclusion on the list for discharge because of their age.*" *Id.* (emphasis added). In modifying

the *McDonnell Douglas* test to tailor-fit the RIF context, the *Mitchell* Court held that a prima facie case may be established by showing that: (1) the employee was protected by the ADEA; (2) he was selected for discharge from a larger group of candidates; (3) he was performing at a level substantially equivalent to the lowest level of those of the group retained; and (4) the process of selection produced a residual work force of persons in the group containing some unprotected persons who were performing at a level lower than that at which he was performing. *Id.* (citing *Duke v. Uniroyal, Inc.*, 928 F.2d 1413 (4th Cir. 1991)). Although an identical test may not be suitable for an ADA case, it is apparent that the Fourth Circuit accounted for a discriminatory discharge during a RIF, which is something that the Sixth Circuit, in the case at bar, did not do.

While the Sixth Circuit has taken (on some occasions) a strict constructionist approach to the *McDonnell Douglas* test in RIFs, and the Fourth Circuit has employed a modified version of that same test, the Third Circuit has implemented yet another version of that test. In *Anderson v. CONRAIL*, 297 F.3d 242, 249 (3d Cir. 2002), the Third Circuit held that an ADEA plaintiff did not have to show he was replaced by a younger worker; rather he had to show that the employer *retained* someone *similarly situated to him* who was younger. The Court of Appeals for the Tenth Circuit has adopted a similar modification of the *McDonnell Douglas*. *See, Whittington v. Nordam Group Inc.*, 429 F.3d 986, 997 (10th Cir. 2005).

The Seventh Circuit has taken a page from this honorable Court's *O'Connor* decision and has "disavowed prior cases . . . suggesting that a Title VII plaintiff must show that she was replaced by someone of a different race, sex, and so on." *Leffel v. Valley Fin. Servs.*, 113 F.3d 787, 793 (7th Cir.

1997). The *Leffel* Court emphasized that "although that kind of proof 'may help to raise an inference of discrimination,' it is not required to make out a prima facie case, so long as there is some evidence from which one can infer that the employer took adverse action against the plaintiff on the basis of a statutorily proscribed criterion." *Id.* (quoting *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159). The *Leffel* Court opined that the:

> . . . central point of both the Supreme Court's opinion in *O'Connor* and our own opinion in *Carson*: [is] that the nature of the proof giving rise to the requisite inference of discrimination cannot be reduced to a formula that will serve any and all discrimination cases . . . . 'the *McDonnell-Douglas* test was never meant to be applied rigidly,' and that the elements of the prima facie case as we had described them might change as the case law applying the ADA evolved.

Id. at 793 (internal citations omitted)).

In *Bellaver v. Quanex Corp /Nichols-Homeshield*, 200 F.3d 485, 494 (7th Cir. 2000), the Seventh Circuit held that:

> Recognizing that these burdens should not be applied rigidly, we have adapted them in special cases to reflect more fairly and accurately the underlying reality of the workplace. In a case involving a reduction in force ("RIF"), it would make no sense to require a plaintiff to show the position from which she had been terminated "remained open," as required by *McDonnell Douglas*.

Despite obliterating the replacement requirement, the *Bellaver* Court still required that a plaintiff prove that

similarly situated employees who were not members of the plaintiff's protected class were treated more favorably. *Id.* (citing *McCreary v. Libbey-Owens-Ford Co.*, 132 F.3d 1159, 1166 (7th Cir. 1997) and *Smith v. Cook County*, 74 F.3d 829, 831 (7th Cir. 1996)).

While some of the Circuits (like the Fourth, Seventh and Tenth Circuits) have modified the replacement requirement, the Fifth Circuit has rejected that requirement entirely in the RIF context. In *Baker v. Randstad N. Am., L.P.*, 151 Fed. Appx. 314, 318 (5th Cir. 2005) (unpublished), the Fifth Circuit held:

> [T]he district court erred when it ruled that Baker failed to establish his prima facie case for failing to submit evidence that he was replaced by someone outside the protected class. A plaintiff in a reduction-in-force case is generally not replaced at all, and thus to establish his prima facie case, he need not prove that he was replaced by someone outside the protected class.

Id. (citing *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 576 (5th Cir. 2003)).

In the case at bar, the record is clear that: (1) Defendant BEPCO did not replace Plaintiff after he was terminated in the summer of 2001 and (2) during the summer and fall of 2001, the company terminated several employees in a workforce reduction. (App. 63a). In its decision on the case at bar, the Court of Appeals for the Sixth Circuit required Plaintiff to make a prima facie case of discrimination under the *McDonnell Douglas* burden-shifting analysis, proving that: (1) he is disabled; (2) he is otherwise qualified for the position; (3) he suffered an adverse employment decision;

(4) the employer knew or had reason to know of his disability; and (5) *after rejection or termination, the position remained open, or the disabled individual was replaced by a member outside the protected class. Id.* (App. 7a). (citing *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1185 (6th Cir. 1996) (emphasis added)). The Sixth Circuit ultimately held that "because there is no evidence that [Plaintiff Merrill] was replaced or that his position was held open," he did not sustain his burden of proof. (App. 9a). The Sixth Circuit specifically stated that his "failure to satisfy the fifth [replacement] prong of the prima facie case is fatal." (App. 10a n.2).

It is critical to note that this application of the *McDonnell Douglas* test in a RIF is even inconsistent with *other* Sixth Circuit panels. In *Fisher v. Trinova Corp.*, 1998 U.S. App. LEXIS 26249 (6th Cir. 1998) (unpublished), the Sixth Circuit applied a modified version of the *McDonnell Douglas* test in the RIF context.[3] The *Fisher* Court held that a plaintiff may substitute the "replacement" element of the test with a showing of "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons."[4] *(Id)*. The Sixth Circuit in the case at bar did not employ a similar analysis; rather, it strictly construed the *McDonnell Douglas*

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[3] The *Fisher* Court relied on *Reeher v. Baker Material Handling Corp.*, 996 F.2d 1216, 1993 WL 220559, at *2 (6th Cir. 1993) (unpublished) (age discrimination) and *Barnes v. Gencorp, Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990) in arriving at its decision.

[4] This requirement is more stringent than (and thus contradicts) this Court's decision that a prima facie case must establish evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion. *O'Connor*, 517 U.S. at 312.

test and required Plaintiff to prove he was replaced by a non-disabled individual.

Again in 2006, the Sixth Circuit modified the *McDonnell Douglas* test in a RIF context and required a plaintiff to present additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons. *Wilson v. Ohio*, 2006 U.S. App. LEXIS 11884, 18-19 (6th Cir. 2006) (unpublished). As is evident, the *Wilson* Court did not follow the Sixth Circuit's *McDonnell Douglas* test outlined by the panel in the case at bar.

As can be seen, therefore, the Sixth Circuit has inconsistently applied the *McDonnell Douglas* test in the RIF context, leading to conflicting results based on differing legal standards. Such varied applications of *McDonnell Douglas* suggests that the Sixth Circuit is internally conflicted on this point and could benefit from a determinative ruling on this issue.

Regardless of its internal conflict, the Sixth Circuit is still at odds with other Circuits on this issue, namely the Third, Fourth, Fifth, Seventh and Tenth Circuits. It is also at odds with this Court in light of the *O'Connor* decision.[5] As this Court held in *O'Connor*, a prima facie case under *McDonnell Douglas* requires at least some logical connection between each element of the prima facie case and the illegal discrimination, and evidence be presented that would raise a reasonable inference of illegal discrimination. In the case at bar, no logical connection exists between the "replacement" prong of the *McDonnell Douglas* test and a discriminatory

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[5] This point will be further discussed in Section II of this Petition, *infra*.

discharge during a RIF. If the replacement prong is strictly applied in the RIF context, companies could discriminate at will, ducking behind the "no replacement" shield, and a discharged employee who has no direct evidence of discrimination (the usual scenario) will be deprived of any legal recourse despite the employer's discriminatory motives or actions in such discharge. The replacement requirement is counter-intuitive in RIFs because an employer has absolutely no desire to actually replace the discharged employee in that context.

This Petition, therefore, should be granted to clarify how the *McDonnell Douglas* test should be applied in RIFs and to provide uniformity in the application of the *McDonnell Douglas* burden-shifting framework in the RIF context.

B. Split of Authority on the Standard of Proof as to Causation in ADA Cases

A second split of authority in the Circuits exists on the standard of proof to be applied in ADA discrimination cases regarding causation. Several Circuits have held that the complained of discrimination must be the ***sole*** cause of the adverse employment action while other Circuits have held that the discrimination must only be ***a*** cause of the discrimination. The Sixth and Seventh Circuits require that the discrimination be the "sole" cause of the adverse employment action. *See McLeod v. Parsons Corp.*, 73 Fed. Appx. 846, 858 (6th Cir. 2003) (holding a Plaintiff must show he or she was discharged solely on account of the disability) (unpublished); *Despears v. Milwaukee County*, 63 F.3d 635, 636 (7th Cir. 1995) (holding proof of sole cause is necessary).

However, the vast majority of the Circuits (namely, the Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits)

use a "mixed-motive" standard, meaning that the adverse employment action must be *because of* the discrimination, but the discrimination need not be the sole cause of the adverse action. *See, Douglas Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 105 (2d Cir. 2001) (holding plaintiff could proceed with his ADA claim because his disability played a motivating role in his discharge); *Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999) (holding that "the ADA does not impose a 'solely by reason of standard of causation'"); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033-34 (7th Cir. 1999) (noting that in order to prevail under the ADA, plaintiffs must demonstrate that impermissible discrimination was a motivating factor); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995) (citing 42 U.S.C. § 2000e-2(m)) ("An employee is entitled to some relief if he or she proves that his or her disability was a 'motivating factor' in the decision made even though other factors also motivated the decision."); *Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 835 (5th Cir. 2000) (noting discrimination need not be the sole reason for the adverse employment decision, but must actually play a role in the employer's decision making process and have a determinative influence on the outcome); *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1064 (9th Cir. 2005) (holding that that a "motivating factor" standard is most consistent with the plain language of the statute and the purposes of the ADA); *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1334 (11th Cir. 1999) (holding that the ADA's "because of" causation language is defined as "a factor that made a difference in the outcome.").

In the case at bar, the U.S. District Court for the Western District of Michigan, applying Sixth Circuit precedent that is out of step with its sister Circuits, ruled that the disability discrimination must be the sole cause of Plaintiff Merrill's termination. (App. 116a-120a). The Sixth Circuit affirmed

the District Court's opinion because Plaintiff failed to meet the replacement prong of the *McDonnell Douglas* test as outlined in the immediately preceding section. The Sixth Circuit, thus, declined to address any other issue. (App. 10a n.2). Although the Sixth Circuit did not address the "sole cause" issue on appeal, the Sixth Circuit clearly applies the "solely because of" standard in assessing ADA cases, as shown in more detail below.

In *McLeod v. Parsons Corp.*, 73 Fed. Appx. 846, 858 (6th Cir. 2003) (unpublished), the Sixth Circuit rejected a "mixed motive theory" under the ADA and required that the discrimination be the sole cause of the adverse employment action. The *McCleod* Court held that a plaintiff must demonstrate that he or she was discharged solely on account of the disability. *Id.* (relying on *Walsh v. UPS*, 201 F.3d 718, 725 (6th Cir. 2000) and *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1177 (6th Cir. 1996)). The *McCleod* Court acknowledged that several Circuits used a "mixed-motive" standard.[6] *Id.* However, the Sixth Circuit

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[6] The *McCleod* Court cited *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1073-77 (11th Cir. 1996); *Douglas Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 105 (2d Cir. 2001) (holding that the plaintiff could proceed with his ADA claim because his disability played a motivating role in his discharge); *Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999) (holding that "the ADA does not impose a 'solely by reason of standard of causation"); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033-34 (7th Cir. 1999) (noting that in order to prevail under the ADA, plaintiffs must demonstrate that impermissible discrimination was a motivating factor); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995) (citing 42 U.S.C. § 2000e-2(m)) ("An employee is entitled to some relief if he or she proves that his or her disability was a 'motivating factor' in the decision made even though other factors also motivated the decision."); *Buchanan v. City of San Antonio*, 85 F.3d 196, 200 (5th Cir. 1996).

specifically stated that it would not adopt the approach of the other Circuits because to do so would effectively reverse the holding of prior Sixth Circuit panels, which it was disinclined to do. *Id.*

Plaintiff Merrill notes for this Court's convenience that the most well-reasoned discussion on whether the ADA requires that discrimination be the sole cause of an adverse employment action is outlined by the Eleventh Circuit in *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1073-1077 (11th Cir. 1996). In *McNely*, the Eleventh Circuit considered relevant statutory language, legislative history, and Supreme Court precedent at the time of the enactment of the ADA. Based on its in-depth analysis, the *McNely* Court ultimately concluded that the ADA did not impose a "solely because of" standard of causation. In its decision, the Eleventh Circuit carefully examined other Circuits' interpretation of the statutory language that had concluded that "because of" meant "solely because of," but the *McNely* Court ruled that it was firmly convinced that "because of" *does not mean* "solely because of" under the ADA and that such an interpretation is directly contrary to the language of the statute and the intent of Congress. *Id.*

It is apparent, therefore, that the Sixth and Seventh Circuits are directly in conflict with the remaining Circuits on whether the ADA requires that the complained of discrimination be the "sole cause" of the adverse employment action. The minority view held by the Sixth and Seventh Circuits creates an unjust result and improperly places a higher burden of proof on plaintiffs who raise ADA discrimination claims in those Circuits. Plaintiff Merrill respectfully requests, therefore, that this Court grant his Petition in order to resolve this legal disparity, particularly in

light of the fact that the Sixth Circuit has refused to depart from prior Sixth Circuit rulings on this issue.

C. Split of Authority on Whether the Ability to Interact With Co-Workers is a Major Life Activity

The third split of authority among the Circuits is whether the ability to *interact with* co-workers constitutes a major life activity for purposes of the ADA. In the case at bar, Plaintiff Merrill asserted that his "***interaction***" with others is substantially limited because of the nature of his disability. In granting Defendant's Motion for Summary Judgment, the U.S. District Court for the Western District of Michigan held that Plaintiff Merrill's inability to "***get along with***" co-workers is not a "major life activity" within the meaning of the ADA. (App. 85a). However, the District Court erred in concluding that the ability to "get along with others" is synonymous with the ability to "interact" with others.

As is evident by the decisional law of other federal Circuits, the "ability to get along with others" and the "ability to interact with others" are different abilities and activities. Thus, the Circuits have drawn a distinction between the ability *to get along* and the ability *to interact*. For example, the Ninth Circuit held in *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999) that "[b]ecause ***interacting with*** others is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity' for purposes of the Americans with Disabilities Act" (citing 42 U.S.C.S. § 12101) (emphasis added).

The First Circuit has held that the ability to ***get along with*** co-workers is *not* a major life activity within the meaning of the ADA. *Soileau v. Guilford of Maine*, 105 F.3d 12 (1st Cir. 1997) (emphasis added). The First Circuit opined that "the

ability to get along with others" is never a major life activity under the ADA, observing that such an ability comes and goes, "triggered by vicissitudes of life which are normally stressful for ordinary people," and that "to impose legally enforceable duties on an employer based on such an amorphous concept would be problematic." *Id.* at 16.

The Second Circuit has equivocated even more. In *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (2d Cir. 2004), the Second Circuit was asked to adopt either the First Circuit's reasoning in *Soileau* or the Ninth Circuit's holding in *McAlindin*. It declined to do either. Pointing out that there is a difference between "get[ting] along with others" (the life activity considered in *Soileau*) and "interacting with others" (the life activity considered in *McAlindin*), the *Jacques* Court ruled:

> We agree with the First Circuit's observation that "getting along with others" is an unworkably subjective definition of a "major life activity" under the ADA -- in much the same way that "perceiving" (as distinct from merely "seeing" or "hearing") would be an unworkably subjective "major life activity." *See Soileau*, 105 F.3d at 15. However, it is difficult to contradict the Ninth Circuit's characterization of "interacting with others" as "an essential, regular function" that "easily falls within the definition of 'major life activity.'" *McAlindin*, 192 F.3d at 1234. We also think that "interacting with others," as overarching as it may be, more objectively describes a life activity than does "getting along with others," which connotes proficiency or success and worsens the problem of subjectivity that concerned the First Circuit. *Cf. McAlindin*, 192 F.3d at 1235 ("trouble getting along with coworkers is not sufficient to show

> a substantial limitation" under the ADA). Although "interacting with others" is a more inclusive activity than (say) "seeing" or "standing," similarly overarching "major life activities" have been endorsed by all of the current members of the Supreme Court in one case or another. *See, e.g., Bragdon*, 524 U.S. at 638-39, 659, 665 (acknowledging "caring for one's self" as a valid "major life activity" under the ADA).
>
> While we accept the Ninth Circuit's premise that "interacting with others" is a "major life activity" under the ADA, we conclude that the Ninth Circuit's test for determining when a limitation on this activity is "substantial" for ADA purposes is unworkable, unbounded, and useless as guidance to employers, employees, judges, and juries. According to the Ninth Circuit -- whose opinion in *McAlindin* the district court's jury instructions in this case tracked -- a plaintiff's impairment in "interacting with others" is "substantial" for purposes of the ADA when it is "characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary," *McAlindin*, 192 F.3d at 1235, so that a mere "cantankerousness," is not enough.

Id.

The Second Circuit aptly noted that "[a]ll other circuits faced with the issue have (sometimes with exertion) avoided deciding whether 'interacting with others' is a major life activity under the ADA." *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 201-202 (2d Cir. 2004) (citing *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 274 (4th Cir. 2004) ("We decline to resolve this issue here because, assuming that

interacting with others is a major life activity, [plaintiff] has not demonstrated that it is an activity in which she is substantially limited."); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 337 (6th Cir. 2002) (noting "that it has been held that 'interacting with others,' is a major life activity" but declining to decide the issue); *Heisler v. Metro. Council*, 339 F.3d 622, 628 (8th Cir. 2003)(declining to hold that "interacting with others [is] a separate major life activity" because plaintiff failed to provide evidence that her mental impairment "substantially limited her ability to interact with others"); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1254-55 (10th Cir. 2001) (declining to address whether interacting with others is a major life activity because plaintiff was not substantially limited in her ability to interact with others); *Emerson v. Northern States Power Co.*, 256 F.3d 506, 511 (7th Cir. 2001) (describing "interacting with others" in apparent dicta as one of many "activities that feed into the major life activities of learning and working")).

As is evident, therefore, a significant split of authority exists among the Circuits on this issue, and its ultimate resolution has been avoided. Plaintiff Merrill invites this honorable Court to resolve this split and consider adoption of the Second Circuit's finding that "interacting" with others is a major life activity for purposes of the ADA.

II. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THIS COURT'S PRECEDENT

As stated earlier, this Court held in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 310 (1996), that a prima facie case under *McDonnell Douglas* requires that there be: (1) at least a logical connection between each element of the prima facie case and the illegal discrimination, and (2) evidence adequate to create an

inference that an employment decision was based on an illegal discriminatory criterion. This Petition has already shown that there is no logical connection between the replacement requirement of the *McDonnell Douglas* test and the discrimination when the case involves a RIF. In *O'Connor*, this Court opined: "In our view, however, the proper solution to the problem lies not in making an utterly irrelevant factor an element of the prima facie case, but rather in recognizing that the prima facie case requires "*evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . .*" *Id.* at 313 (citing *Teamsters v. United States*, 431 U.S. 324, 358, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977) (emphasis in original)).

In the case at bar, Plaintiff Merrill claimed that he was entitled to have the jury decide whether there was a reasonable inference of discrimination based on the facts of his case. Plaintiff Merrill argued that a "reasonable inference" of discrimination precludes summary judgment, without the need to apply the full *McDonnell-Douglas*. Plaintiff Merrill cited several cases to support his position, including the *Teamsters* case relied upon by this Court in *O'Connor* in determining that a prima facie case requires "evidence adequate to create an inference" of illegal discrimination. (*Plaintiff's Petition for En Banc Rehearing, at 9)*. The Sixth Circuit ignored Plaintiff Merrill's argument, despite the weight of this Court's binding precedent. Instead, it ruled that the use of a "reasonable inference" standard would be inconsistent with earlier case law of the Sixth Circuit. (App. 9a-10a). This legal conclusion directly contradicts the *O'Connor* precedent and its application of the *McDonnell Douglas* test in the context of discriminatory discharge.

Plaintiff Merrill respectfully requests that this Court grant his Petition in order to rectify this error and to clarify the applicable standards for establishing a prima facie case of discriminatory discharge under the ADA, particularly in RIF cases.

III. THE NATIONAL IMPORTANCE OF THIS CASE

This case is of nationwide importance because the current application of non-uniform standards for claims under the ADA, and under other anti-discrimination laws analyzed under the *McDonnell Douglas* framework, by the Circuits will directly impact millions of workers across the nation. The express purpose of the ADA is "to provide a *clear and comprehensive national mandate* for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (emphasis added). As can seen by the above, there is no clear and comprehensive mandate about the application of the ADA on at least three issues: (1) whether the *McDonnell Douglas* test should be modified in the RIF context, (2) whether the ADA requires that the complained of discrimination be the sole cause or only a motivating cause of the adverse employment action, and (3) whether one's ability to interact with co-workers is a major life activity under the ADA. A consistent answer to all of these questions, particularly in light of the vast inconsistencies that exist today, will provide uniformity, clarity and certainty for all courts and parties involved in ADA cases. A clear mandate is needed from this Court in order for the Circuits to effectuate the stated purpose of the ADA.

If the Sixth Circuit's precedent stands, no individual with a qualifying disability who was fired during a RIF and who does not have direct evidence of discrimination will be able to sustain a prima facie claim of discrimination under the ADA.

Recognizing this, companies will be empowered to hide behind a "no-replacement" excuse to improperly discriminate against their disabled workers. Further, individuals asserting ADA discrimination claims within the reach of the Sixth Circuit will be required to prove that the complained of discrimination was the sole cause of the adverse action, whereas individuals that file cases in the vast majority of other Circuits will be disparately entitled to maintain their claims. Moreover, if an individual within the jurisdiction of the Sixth Circuit suffers from a disability that includes an inability to interact with co-workers – as Plaintiff Merrill in the case at bar – such an individual will not be deemed qualified to sustain a claim for discrimination under the ADA within the bounds of the Sixth Circuit Court of Appeals.

For these reasons, benefit has been sought through Plaintiff Merrill's lawsuit and a common benefit sought for all similarly situated individuals. In view of the pervasiveness of the conflict among the Circuits on several critical ADA issues, and the fact that the Sixth Circuit's decision nullifies the rights of a certain class of individuals who have suffered discrimination at the behest of their employer, the Sixth Circuit's decision perpetuates an unfairness and injustice to the average American worker covered by the ADA. Such a result should not be allowed without review by this Court.

CONCLUSION

For all the foregoing reasons, the Petition should be granted and the judgment below reversed.

Respectfully submitted,

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Date: June 6, 2006

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-2188

[Filed March 9, 2006]

DANIEL LEE MERRILL, SR., Plaintiff-Appellant,	)
v.	)
BURKE E. PORTER MACHINERY COMPANY, Defendant-Appellee.	)

ORDER

BEFORE: SILER and SUTTON, Circuit Judges; and SHARP*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* Hon. Allen Sharp, United States District Judge for the Northern District of Indiana, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-2188

[Filed December 14, 2005]

DANIEL LEE MERRILL, SR., Plaintiff-Appellant,	)
v.	)
BURKE E. PORTER MACHINERY CO., Defendant-Appellee.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: SILER and SUTTON, Circuit Judges; and SHARP*, District Judge.

* Hon. Allen Sharp, United States District Judge for the Northern District of Indiana, sitting by designation.

OPINION

PER CURIAM. Daniel Lee Merrill, Sr. appeals from the district court's order entering summary judgment in favor of appellee Burke E. Porter Machinery Co. ("BEPCO"), his former employer. Merrill contends that BEPCO violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* (1994), by terminating his employment. The district court rejected Merrill's claims, concluding that he failed to establish the essential elements of a disability discrimination claim under the ADA. On appeal, Merrill argues that the district court erred in excluding sworn statements in his complaint, in requiring that disability discrimination be the sole cause of his termination, in failing to find that the facts permit a "reasonable inference" that he was terminated because of his alleged disability, and in finding that his impairment was not a "disability." Because we find that the plaintiff failed to establish a prima facie case of discrimination, we affirm the judgment of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

BEPCO, which designs and manufactures large specialized machines, hired Merrill as a mechanical project engineer in May 1997. Merrill reported to mechanical engineering manager Tim Leep. When Merrill became stressed, Leep would allow him to walk around the building, leave work early, work at home, and arrive at work early in the morning when there were fewer distractions.

In September, 1999, Merrill saw psychologist Timothy Zwart. Zwart noted that Plaintiff avoided eye contact. In May, 2000, Zwart concluded that Merrill suffered from Asperger's syndrome, a condition that causes, among other things, avoidance of eye contact. Merrill also began

counseling with psychologist Gailord Weeks, who testified that Merrill had problems with interpersonal behavior and eye contact, and that those are symptoms of Asperger's.

In November, 2000, Merrill met with Human Resources Manager Diane Roodvoets and engineering manager Ralph Palmer. Palmer learned at this meeting that Merrill had Asperger's syndrome. According to Merrill, Palmer treated him differently after the meeting, refusing to talk to Merrill in Palmer's office and calling Merrill "stupid."

Merrill was transferred to John Clawson's supervision in December, 2000. In April, 2001, Clawson was moved to a different department and Merrill came under the direct supervision of Palmer. Palmer and Merrill continued to have problems working together. Palmer requested that Merrill redesign a certain machine, but Merrill never did. According to Merrill, when he told Palmer he had not redesigned the machine, Palmer questioned, "what the h*ll is wrong with you?"

On June 8, 2001, Palmer came to Merrill's work station and said that problems had been raised at a production meeting regarding one of Merrill's designs. After Merrill acknowledged the problems with the parts he designed, Palmer asked him, "why is [sic] there always mistakes on your jobs?" Merrill replied that he could not control the detailers and checkers upon whom he relied. Palmer said that Merrill was "technically incompetent" and could not "draw worth a [expletive deleted]." Merrill then asked Palmer "how would [you] know" and told Palmer: "you are out of line." Palmer then escorted Merrill to the Human Resources office and out of the building, terminating Merrill's employment at BEPCO. Palmer later stated that he terminated Merrill for

poor performance, citing repeated design mistakes and Merrill's unwillingness to correct them.

At a review meeting on June 12, 2001 involving BEPCO President Andrew Murch, Roodvoets, Palmer and Merrill, Merrill was asked if he had ever mentioned his disability to any one. Merrill replied: "That was the statement that [Palmer] said that was weird . . . where he said that when he would talk to me I wouldn't hold eye contact with him; that means I can't be trusted." He also stated that Palmer stated that "when [Palmer] was talking to me out in the shop, I made funny faces at him and . . . that was insubordination in his mind." Merrill was neither reinstated, nor replaced, and his position was not left open.

Merrill, proceeding *pro se,* filed his complaint in the district court in September 2002 and retained counsel in August 2003. Merrill's counsel did not amend Merrill's *pro se* complaint. BEPCO moved for summary judgment on April 2, 2004, and summary judgment was granted in BEPCO's favor on September 2, 2004. This appeal followed.

II. STANDARD OF REVIEW

This court reviews the district court's grant of summary judgment *de novo*. *Lautermilch v. Findlay City Sch.*, 314 F.3d 271, 274 (6th Cir. 2003). "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.; see* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The court must view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962);

Bender v. Southland Corp., 749 F.2d 1205, 1210-11 (6th Cir. 1984).

III. DISCUSSION

The ADA prohibits an employer from discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A plaintiff may establish unlawful discrimination by introducing direct evidence of intentional discrimination, including evidence that the employer relied on the plaintiff's disability in making its employment decision. *See Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996). Where no direct evidence of discrimination exists, a plaintiff must proceed under the familiar burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under this framework, a plaintiff may establish a prima facie case of discrimination by showing that: (1) he is disabled; (2) he is otherwise qualified for the position; (3) he suffered an adverse employment decision; (4) the employer knew or had reason to know of his disability; and (5) after rejection or termination, the position remained open, or the disabled individual was replaced by a member outside the protected class. *Monette*, 90 F.3d at 1185. Merrill's claim fails under both methods.

Merrill argues that there is "direct evidence" that he was terminated because of a disability. He testified during a deposition as follows:

Q In the meeting that you had with Murch, Palmer

> and Roodvoets on June 12, did anybody talk about Asperger's Syndrome?
> A I mentioned it not in word, but in - as a disability once.
> Q What did you say?
> A That was the statement that Ralph [Palmer] said that was weird, I thought was really weird, where he said that when he would talk to me I wouldn't hold eye contact with him; that means I can't be trusted. And when he was talking to me out in the shop, I made funny faces at him and he said that was insubordination in his mind, and that was - I mean, I just turned to Andy and said, "That's part of my disability. You can't hold that against me."

He argues that the inability to maintain eye contact is a symptom of Asperger's, and that Palmer's reference to that symptom is tantamount to Palmer saying he fired Merrill because of Asperger's. He also argues that Palmer called him "stupid," told him that he wasn't special and would not be treated special, and asked "what the h*ll is wrong with you." These statements, according to Merrill, are direct evidence of discrimination. We disagree.

"Direct evidence" is evidence which, if believed, requires the conclusion that unlawful discrimination was a motivating factor in the employer's decision. *See Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (*en banc*) (citing *Jacklyn v. Schering-Plough Healthcare Products Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)). "Direct evidence is evidence that proves the existence of a fact without requiring any inferences." *Rowan v. Lockheed Martin Energy Systems, Inc.*, 360 F.3d 544, 548 (6th Cir. 2004) (citations omitted). Palmer never made any reference to disability, and never stated that he terminated Merrill because of a failure to

hold eye contact. At best, Palmer's statements show only that he felt Merrill could not be trusted because of his failure to hold eye contact and that the "funny faces" made by Merrill amount to insubordination. The jury, to conclude from these statements that Merrill was fired because of his disability, would have to infer that Palmer's lack of trust in Merrill led to Merrill's termination or that the funny faces were caused by Merrill's disability. They would also have to infer that Palmer knew the avoidance of eye contact to be a symptom of Asperger's. While these conclusions may be reasonable, they are nonetheless conclusions that must be reached by inference. Palmer's other statements are similarly deficient because they require additional inferences before they can be linked to a disability.[1] *Cf. Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998) (noting that direct evidence "would take the form, for example, of an employer telling an employee, 'I fired you because you are disabled.'").

Because Merrill lacks direct evidence of discrimination, he must establish a prima facie case of discrimination as established in *McDonnell-Douglas* and outlined above. Merrill admits that he cannot do so, because there is no evidence that he was replaced or that his position was held open. Instead, he argues that a "reasonable inference" of discrimination precludes summary judgment, without the need to apply *McDonnell-Douglas*. Merrill fails to cite any case applying this standard to a disability discrimination claim, however,

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[1] Merrill also argues that the district court erred in refusing to consider sworn statements made in Plaintiff's complaint. Any error made by the district court on this point is necessarily harmless, however, because the statements offered by Merrill as wrongly excluded fall far short of establishing direct evidence of discrimination.

and such an approach would be inconsistent with the case law of this circuit.[2]

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[2] In light of this conclusion, we need not address Merrill's ability to satisfy the other elements of his prima facie case. Though the parties vigorously dispute whether Merrill was "disabled" within the meaning of the ADA, his failure to satisfy the fifth prong of the prima facie case is fatal. Additionally, we need not address the issue of whether BEPCO provided a nondiscriminatory reason for terminating Merrill. That burden does not shift to the defendant unless the plaintiff can first establish his prima facie case. *See Monette*, 90 F.3d at 1185 ("If the plaintiff fails to establish a predicate fact necessary to create the presumption of unlawful intent, technically the 'burden' never shifts to the defendant.").

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MICHIGAN SOUTHERN DIVISION

No. 1:02-cv-669

[Filed September 2, 2004]

DANIEL LEE MERRILL, SR., Plaintiff,

v.

BURKE E. PORTER MACHINERY CO., Defendant.

Honorable Joseph G. Scoville

OPINION

This is a civil action brought pursuant to Title I of the Americans with Disabilities Act of 1990 ("ADA"), 104 STAT. 327, 42 U.S.C. §§ 12101-12117. Plaintiff named his former employer, Burke E. Porter Machinery Co. ("BEPCO"), as defendant. Plaintiff's complaint alleges in broad fashion that he is a resident of Newaygo County, Michigan and has a Physical Disability, Mental Disability and

Learning Disability, record of disability, and/or is regarded as having a disability within the meaning of 42 U.S.C. § 12102 of the ADA." (docket # 1, p. 2, ¶ 1). Plaintiff's complaint does not identify the nature of any purported physical disability, but paragraph 4 asserts that plaintiff has three mental impairments: "Asperger's Syndrome," "dysthymia," and "a specific Learning Disorder in the area of 'Working Memory.'" (docket # 1, ¶ 4). The seven counts set forth in plaintiff's complaint are as follows:

Count I: Lack of "good faith" negotiations after being informed of plaintiff's disability;

Count II: Lack of accommodation after being informed of the plaintiff's request for "stress time;"

Count III: Lack of accommodation after being informed of the plaintiff's request of "group reassignment;"

Count IV: Lack of accommodation after being informed of plaintiff's request of "Software package usage;"

Count V: Lack of accommodation after being informed of plaintiff's request of "flexible break and start times;"

Count VI: Violation of the ADA by terminating plaintiff's employment; and

Count VII: Violation of the ADA by keeping plaintiff's medical records in a human resources file.

(Complaint at 7, 8). Plaintiff seeks monetary damages and injunctive relief.

The parties have voluntarily consented to the dispositive jurisdiction of a magistrate judge to conduct any and all proceedings in this case, including entry of final judgment, pursuant to 28 U.S.C. § 636(c). (Consent and Order of Reference, docket # 11).

The matter is now before the court on defendant's motion for summary judgment. (docket # 80). Plaintiff filed a brief in opposition to defendant's motion. (docket # 85). Defendant filed a reply brief. (docket # 87). On May 27, 2004, the court heard oral argument on defendant's motion and took the motion under advisement. Upon review, defendant's motion for summary judgment will be granted and judgment entered in defendant's favor on all claims.

Applicable Standard

Summary judgment is appropriate when the record reveals that there are no genuine issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Gettings v. Building Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 305 (6th Cir. 2003); *Carter v. University of Toledo*, 349 F.3d 269, 272 (6th Cir. 2003). The standard for determining whether summary judgment is appropriate is "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Terry v. LaGrois*, 354 F.3d 527, 530 (6th Cir. 2004) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)); *see Martingale LLC v. Louisville*, 361 F.3d 297, 301 (6th Cir. 2004).

The court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004). The party moving for summary judgment bears the initial burden of pointing out to the district court that there is an absence of evidence to support the nonmoving party's case, but need not support its motion with affidavits or other materials "negating" the opponent's claim. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 787 (6th Cir. 2000). Once defendant shows that "there is an absence of evidence to support the nonmoving party's case," plaintiff has the burden of coming forward with evidence raising a triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Plaintiff's brief advocates in favor of a different standard, under which the court would be required to ignore all evidence proffered by defendant, on the ground that a jury might choose to disbelieve it. Plaintiff's proposed standard is unsupportable. "A nonmoving party may not avoid a properly supported motion for summary judgment by simply arguing that it relies solely or in part on credibility considerations. Instead, the nonmoving party must present affirmative evidence to defeat a properly supported motion for summary judgment. The party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and the opposing party may not merely recite the incantation, 'credibility,' and have a trial on the hope that a jury may believe factually uncontested proof." *Fogerty v. MGM Group Holdings Corp., Inc.*, Nos. 03-5498, 03-5874, __ F.3d__, 2004 WL 1724165, at * 5 (6th Cir. Aug. 3, 2004). "Summary judgment must be entered 'against

a party who fails to make a showing sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Laderach v. U-Haul,* 207 F.3d 825, 828 (6th Cir. 2000) (quoting *Celotex,* 477 U.S. at 322).

Facts

A. Plaintiff's Employment History

Plaintiff was employed by Burke E. Porter Machinery Co. ("BEPCO") from April 1997 through June 8, 2001, as a mechanical project engineer. (Plf. Dep. at 28, 91, 93). BEPCO designs and manufactures large specialized machines, primarily for automobile and truck manufacturers. BEPCO's products include emission dynamometers, brake test machines, and vehicle testing equipment. (Palmer Aft. ¶ 1, docket # 82, Ex. D). Plaintiff graduated from Gobles High School with a 2.497 grade-point average (Plf. Dep. at 505-07) and subsequently attended a trade school.

Plaintiff's answers to defendant's interrogatories detailed plaintiff's remote and recent employment history. (docket # 86, Ex. 12; Plf. Aff., ¶ 4). Historically, plaintiff left his positions with the following companies for increased salaries elsewhere: Hamilton Machinery Builders, Kalamazoo Conveyor Company, and Aero-Detroit. Plaintiff was laid off from employment at Morbark Industries, American Sunroof Corp., Cars and Concepts, and Jubbu Designers, Inc.

Plaintiff indicated that he left Jeep Truck Engineering for personal reasons, including the fact that his vehicle had twice been broken into while parked in the employee parking lot. Plaintiff left KarKraft when that company experienced a work slow down. Plaintiffworked at Entech until "the project lost

its funding." Plaintiff left Auto-Dynamics Corp. "at the end of the Development stage." Plaintiff indicated that he left his positions at Pioneer Engineering and Modern Engineering "for more challenging work."

Plaintiff's remote history also included the study of advanced photographic techniques, and in 1988 and 1989, ownership of a photography studio in Holly, Michigan, named "The Model Image." (Plf. Dep. at 59). In the mid-1980's, plaintiff had undertaken the effort to become a real estate developer in the Kalamazoo, Michigan area while also working a full-time job on the other side of the state in Brighton, Michigan. Plaintiff elected to terminate this real estate enterprise because he believed that its manager was skimming profits and that his wife Lynn and her boyfriend were going to try to get "half of everything." (Plf. Dep. at 62-65). Plaintiff testified that his subsequent real estate endeavors focused on rehabilitating and selling homes for a profit. Plaintiff testified that he studied electrical code books and performed the necessary electrical and plumbing work himself. (Plf. Dep. at 65-71). Plaintiff testified that he began fly fishing in approximately 1993 and as of May 6, 2003, it was his "chief avocation." (Plf. Dep. at 71). Plaintiff indicated that he was primarily self-taught through books and trial and error, but had once hired a guide to take him out and show him a few tricks. Plaintiff stated that he also spent his time tying flies. He testified that he had taught and continued to each people how to fly fish for steelhead and salmon on the Muskegon River located behind his house. (Plf. Dep. at 62, 72).

Plaintiff's four employers immediately prior to BEPCO were: H&H Machine Tool, Imperial Design Service/Prince, PCA/CMI, and Superior Concepts. Plaintiff was laid off at H&H and Prince/Imperial Design as part of corporate

restructurings. (Plf. Dep. at 36-37; docket # 86, Ex. 12). Plaintiff began employment at PCA/CMI in early 1994. (Plf. Dep. at 31). Plaintiff elected to leave his employment at PCA/CMI in 1996, when a dispute arose because plaintiff believed that PCA/CMI was putting other employees' names on its patent applications and it was plaintiff's position that his name should have been the only name listed on two specific patent applications. (Plf: Dep. at 52-58; docket # 86, Ex. 12). Plaintiff testified that in connection with this dispute, he took up an independent study of business and patent law. Plaintiff testified that understanding of this material came to him "naturally." (Plf. Dep. at 59). Plaintiff testified that he had also undertaken a fairly extensive study of psychology and human development. (Plf. Dep. at 44-48).

Plaintiff testified that while employed at Superior Concepts, immediately prior to his employment at BEPCO, plaintiff was able to get along with his supervisor and co-workers. (Plf. Dep. at 35-36). Plaintiff stated that he elected to resign from this position as a project engineer at Superior Concepts after roughly two months because plaintiffdid not feel that he could work fast enough using their AutoCAD system as compared to other engineers, designers and detailers he was working with. (Plf. Dep. at 33-34). Plaintiff had never used AutoCAD prior to his employment with Superior Concepts. (Plf. Dep. at 34). Plaintiff testified that he had used other computer-based design programs, specifically a Chrysler in-house 3-D surface development program that he had utilized while employed at KarKraft in Dearborn, Michigan. (Plf. Dep. at 34, 40).

B. Plaintiff's Employment at BEPCO

Plaintiff first interviewed for employment at BEPCO in early 1997. The resume plaintiff submitted in support of his

employment application indicated that plaintiff was expecting to receive a college degree by the fall of 1997. (docket # 86, Bates Stamped Exs. 294-95; docket # 82, Ex. B). Plaintiff never completed any college course work at Kennedy-Western University or anywhere else after mid-1996. (Plf. Dep. at 87-89). Plaintiff has never obtained any type of degree beyond his high school diploma.

Before being hired by BEPCO as an employee, plaintiff had performed work for BEPCO on a contract basis. At that time, plaintiff was employed by a temporary services firm, Great Lakes Employment. (Plf. Dep. at 28-29). Through Great Lakes Employment, plaintiff worked as a contractor on a brake-testing machine. (Plf. Dep. at 29). Plaintiff testified that as a contractor, he worked under the supervision of Tim Leep. Tim Leep in turn reported to Chuck Cowham. (Plf. Dep. at 30). Plaintiff stated that he got along "great" with Leep as his supervisor. (Plf. Dep. at 30). Tim Leep was plaintiff's immediate supervisor for approximately the first two years as a BEPCO employee.

BEPCO then employed plaintiff as a mechanical project engineer. Leep allowed plaintiff to draft projects using a two-dimensional AutoCAD program, rather than the three-dimensional computer programs BEPCO was then in the process of implementing. (Plf. Dep. at 199). During his employment at BEPCO, plaintiff was repeatedly encouraged to learn three-dimensional computer programs. BEPCO offered and paid for training of its employees on these programs. Plaintiff attended, but failed to complete a CADkey course. Plaintiff testified that at the time he took this CADkey course, there was discussion that BEPCO might be implementing a new Desktop software program. Plaintiff stated that he "rode it out for a long time" not learning CADkey. Plaintiff testified that when BEPCO changed to

Desktop software, he "took their Desktop course," but claimed that he did not even have time to try the Desktop program before BEPCO began converting to Inventor software. (Plf. Dep. at 187). Plaintiff admitted that BEPCO had never given him any deadline for learning these 3-D software programs. Plaintiff was not threatened with disciplinary action if he failed to learn the new software. (Plf. Dep. at 407).

Tim Leep also allowed plaintiff to leave work early, enabling plaintiff to meet his children at the school bus. (Plf. Dep. at 375-76). Leep's reviews of plaintiff's work performance were generally positive. (docket # 86, Bates-Stamped Exs. 309-12). Tim Leep's 1997 year-end review encouraged plaintiff to complete the courses necessary for plaintiff to receive his college degree. (Plf. Dep. at 87-89; docket # 86, Ex. 8). BEPCO's employee appraisal also advised plaintiff to "learn the CAD system better (both AutoCAD and CADkey for now)." (docket # 86, Ex. 8). Plaintiff's self-appraisal for this period contained this statement: "I believe that I work with a mental intensity higher than most, which allows me to complete more assignments in a lesser amt. of time. Through practice, I can mentally work on varied projects at the same time. (Physically work on one, mentally work on 3 or 4). I do have a tendency to stress myself out this way." (Bates-Stamped Ex. 367, docket # 86).

Plaintiff's job classification during his entire employment at BEPCO was "mechanical project engineer." (Plf. Dep. at 91-93). Defendant terminated plaintiff's employment on June 8, 2001, the details of which are discussed at length herein. Plaintiff testified that this four and one-half year period of employment at BEPCO was the longest period he had ever worked for any employer. (Plf. Dep. at 28,544; docket # 86,

Bates-Stamped Ex. 294). Other than BEPCO, the longest plaintiff had been employed by any other employer was approximately two and one-half to three years. (Plf. Dep. at 544; docket # 82, Ex. B). Plaintiff testified that during his entire employment at BEPCO he had been able to care for himself in terms of personal care such as feeding, bathing and dressing himself. (Plf. Dep. at 378). Plaintiff's speaking and hearing abilities remained intact. Plaintiff did not have any difficulty handling the physical or manual aspects of his job at BEPCO. (Plf. Dep. at 379-81).

C. Mechanical Project Engineer Position

The following exchange from plaintiff's deposition provides an overview of how a the position of "mechanical project engineer" fit into BEPCO's overall process of producing BEPCO machines:

> Q The ultimate objective here, would you agree, is to design a machine so that the detailers can draw the parts correctly from your design, and if they do their job right, the fabricators are going to be able to fabricate the parts correctly, and if the fabricators do their job right, the assembly people should be able to assemble this correctly so that everything fits in the right place and the machine that you have designed is, in fact, buildable; is that right?
>
> A Yes.
>
> Q And the objective also is to make sure that once built, the project gets to the customer and can do what the customer needs it to do and withstand the

stresses and tensions that the customer's use is going to place on it; is that correct?

A The stresses as you understand them.

Q Right, sure. If the customer uses it in a way that they never told you they were going to use it, that may create problems.

A Or sometimes there's miscommunication, areas that you have no idea.

Q I understand. And the other objectives would be to do this on a timely basis in compliance with the customer's delivery expectations?

A Yes.

Q And to do this profitably?

A. Yes.

(Plf. Dep. at 123-24).

As a mechanical project engineer, plaintiff was responsible for the final assembly drawing. The final assembly drawing is the detailed final drawing that when completed is "released to the floor" by the mechanical project engineer. The actual construction of the machine begins upon the release of the final assembly drawing. (Plf. Dep. at 491-92). BEPCO's final assembly drawings were required to be completed in three-dimensional format. (Plf. Dep. at 315). Unlike the mechanical project engineer, BEPCO's detailers and designers were not authorized to release final assembly drawings. (Plf. Dep. at 491). The ultimate product of a

mechanical project engineer is the final assembly drawing. Ifa mistake appeared in the final assembly drawing, it was the mechanical project engineer's responsibility. (Plf. Dep. at 492-93).

According to plaintiff, a mechanical project engineer would start a project upon receipt of a quote from an application engineer. Upon identification of what the customer wanted BEPCO to build, it was the mechanical project engineer's job to make sure that the machine provided by BEPCO would meet the customer' s needs. (Plf. Dep. at 94, 106-111). The mechanical project engineer was responsible for making sure that the machine parts, material, and overall integrity of the machine would withstand the demanded stresses. Plaintifftestified that "ideally" the mechanical project engineer would also determine whether the machine would fit within the area the customer intended to use it and work within the allotted space. (Plf. Dep. at 103-05).

Plaintiff stated that after he had completed a "math sheet" of his calculations, it was his practice to initially prepare a hand drawing. (Plf. Dep. at 112). He would then compile a list of the tests the particular machine needed to perform. Plaintif would calculate shaft speeds and bearing loads and determine which components were needed. Plaintiff attempted to start with the components with the longest lead time. (Plf. Dep. at 113). Plaintiff would then draw the machine with its parts, but not to exact specifications. Plaintiffstated that it was his practice to draw utilizing a two-dimensional AutoCAD program, then forward his drawings to detailers or designers to have them take plaintiff's 2-D geometry and stretch it into 3-D. (Plf. Dep. at 116-17). As previously noted, all final assembly drawings at BEPCO were required to be made in three dimensions and it was the mechanical project engineer's responsibility to release these final assembly drawings to the

shop floor. (Plf. Dep. at 315). At his May 6, 2003 deposition, plaintiffdescribed BEPCO's method of having the mechanical project engineer perform his own checking and detailing as "old fashioned" and too expensive. (Plf. Dep. at 348).

Plaintiff stated that it took him roughly five months at BEPCO to learn how to effectively utilize the two-dimensional AutoCAD software. (Plf. Dep. at 143-44). Plaintiff testified that he learned to use the AutoCAD program while working on a single axle brake machine for Samsung. Plaintiff testified that he printed out a list of all the AutoCAD drawing commands and taped them to his drawing board. Plaintiff referred to the list while making his drawings and by the time he was done with this job, he could use the AutoCAD program. Plaintiff testified that he had not required any classes or training. (Plf. Dep. at 119, 197-98). Plaintiff stated that after learning the AutoCAD program, he could draw "automatically." Plaintiff acknowledged that it took other BEPCO employees a significant amount of time to attempt to convert his 2-D drawings into three dimensions. When asked at his deposition about his own work with 3-D software, plaintiff testified, "The commands that take me seconds in AutoCAD might be five minutes in CADkey, and it's hard for my mind to operate that slow. I mean, I'm so far ahead, you know, I can't - I have a really hard time with it." (Plf. Dep. at 144). Plaintiff stated that when he sent a 2-D AutoCAD file to someone else for conversion converted into 3-D CADkey or 3-D Mechanical Desktop, it required the individual performing the conversion to apply "a lot" of CADkey or Mechanical Desktop keystrokes or commands to complete the extrapolation, some of which were very complex and not intuitive. (Plf. Dep. at 145). Plaintiff stated that he took one CADkey class offered by BEPCO, but claimed that he could

not do it because he found the program to be "counter intuitive." (Plf. Dep. at 146).[1]

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[1] Plaintiff's deposition is 549 pages in length and was taken over the course of three days, concluding on February 23, 2004. Defendant filed the motion for summary judgment now before the court on April 2, 2004, supported by extensive portions of plaintiff's deposition. Among the exhibits plaintiff submitted in opposition to defendant's motion for summary judgment was a short affidavit from plaintiffdated April 28, 2004, stating, "The factual statements alleged in my original complaint filed in this case are true to the best of my knowledge, except that, in quoting management statements, I sometimes omitted mention of their use of obscenities, such as the 'F word.'" (docket # 86, Plf. Aff. ¶ 3). Conclusions of law and arguments appearing within an affidavit obviously cannot create a genuine issue of fact for trial. *See F.R.C. Int'l v. United States*, 278 F.3d 641, 643 (6th Cir. 2002); *see also Harrahs Enter. Inc. v. Ace Am. Ins. Co.*, No. 02-6519, 2004 WL 1193958, at * 6 (6th Cir. May 27, 2004). It is well-established that "a party cannot create a factual issue by filing an affidavit which contradicts earlier deposition testimony after a motion for summary judgment has been made." *Graham v. American Cyanamid Co.*, 350 F.3d 496, 509 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 2040 (2004); *see Steier v. Best (In re Best)*, No. 03-5098, 2004 WL 1544066, at * 9 (6th Cir. June 30, 2004) (collecting cases); *Biechele v. Cedar Point*, 747 F.2d 209, 215 (6th Cir. 1984). Paragraphs 4, 13, 17, and 21 of plaintiff's complaint asserting that plaintiff was a "salaried employee," that detailers could "easily translate" plaintiff's 2-d AutoCAD drawings to 3-D CADkey or mechanical desktop drawings, and that all engineers would be required to work the same hours without exception are all directly contrary to plaintiff's deposition testimony (Plf. Dep. at 14445,445,452-54), and as such must be disregarded. Furthermore, the general assertions made in the complaint subsequently endorsed by his plaintiff's affidavit must give way to plaintiff's more specific and detailed deposition testimony, which is addressed at length herein.

Plaintiff reported that he worked closely with detailers and stated that he got along well with them. (Plf. Dep. at 133-36). The detailers worked in a separate support group, so detailers did not work directly for plaintiff. Plaintiff did not control the detailer assigned to a particular project. (Plf. Dep. at 134). Plaintiff stated that he did not normally detail his own parts, unless plaintiff believed that the parts were complicated and could easily be misunderstood. Plaintiff gave as an example a large casting involving a significant monetary investment by BEPCO. Plaintiff related that on such a project he would either detail it himself or at least check it. (Plf. Dep. at 135). Plaintiff stated that he did most of his work alone. He indicated that he attempted to walk through the shop at least twice a day to keep an eye on where parts were in the system and to determine whether the group performing the assembly required his assistance. (Plf. Dep. at 138). Plaintiff testified that this was always the case when a first-time design was being assembled. (Plf. Dep. at 138).

Plaintiff testified that when he was initially hired by BEPCO in 1997, there had been an institutional preference for shipping machines on time, with the thought that any necessary debugging and repair work could be completed on the customer's site. In plaintiff's terminology, this had "pissed off quite a few customers." Plaintiff acknowledged that during the last couple of years of his employment at BEPCO the shipping date became less important and that it was more important to get the machine working right before it went out the door, because waiting to perform debugging on the customer's floor eroded the customer's confidence in the company's abilities. (Plf. Dep. at 216).

D. BEPCO's Creation of Product Groups

In 1999, BEPCO divided its engineering department into several product groups. In 1999, Tim Leep was assigned to BEPCO's end of the line group, referring to the group specializing in BEPCO machines designed to test products, primarily automobiles, at the end of an assembly line. (Leep Dep. at 22). Plaintiff was briefly assigned to a small research and development group. (Leep Dep. at 22). Dave Harris was plaintiffs immediate supervisor in this short-lived R&D group. (Leep Dep. at 23). Plaintiff testified that he got along with Harris as his supervisor and Hill Sybesma, the only other employee in the R&D group. (Plf. Dep. at 156-57).

After BEPCO's reorganization, Tim Leep continued to have some indirect contact with plaintiff related to research and development. However, Tim Leep testified that at that time, the primary focus of Leep's work was the end of the line group, which did not have any major research and development projects underway. (Leep Dep. at 25). The other BEPCO groups at that time included the dynamometer and servo-hydraulics groups. (Leep Dep. at 23).[2]

The small R&D group was dissolved shortly after its inception. Plaintiff was then assigned to the end of the line group with Tim Leep as his supervisor. (Plf. Dep. at 154-55, 162, 260). Plaintiff testified that he spent a portion of his time on cost-cutting and product plan development projects. On those projects, he reported directly to Engineering Vice President Rod Mitton or Chuck Cowham. Plaintiff testified that he did not have difficulty getting along with either of

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[2] A dynamometer is a machine that measures vehicle output. (Leep Dep. at 24).

these supervisors. (Plf. Dep. at 165). Plaintiffs 1999 year-end employee appraisal was generally positive. Areas noted where plaintiff could use improvement were in the organization of plaintiff's work area so that others could locate project information when plaintiff was absent, assisting in the departmental goal of zero late projects for 2000, improved teamwork, and learning to utilize the Mechanical Desktop software program to a point where plaintiff could effectively design with it. (docket # 86, Bates-Stamped Exs. 313-14).

E. Psychologist Zwart's September 1999 Report

Plaintiff testified that before September 1999, he had never heard of Asperger's Syndrome or Asperger's Disorder. Plaintiff stated that at that time, he had referred his son to Psychologist Timothy Zwart for an evaluation of possible attention deficit/hyperactivity disorder. (Plf. Dep. at 400). In September 1999, plaintiff made a self-referral to Psychologist Zwart for evaluation whether plaintiff had possible attention deficit/hyperactivity disorder. Psychologist Zwart's September 30, 1999 report stated, "This writer evaluated Mr. Merrill's son several weeks ago and he evidently decided it would be helpful for him to undergo the same assessment." (docket # 86, Bates-Stamped, Ex. 1137). Plaintiff did not relate any history of lengthy or intensive mental health care. Plaintiff stated that he had "a couple of episodes of counseling after both of his divorces." *(Id.* at 1139).[3] Plaintiff advised

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[3] Plaintiff's first marriage of roughly six years' duration had been to Lynn Wilcutt from 1983 to 1989. (Plf. Dep. at 23-24). Plaintiff testified at his deposition that Lynn was not faithful to their marriage. (Plf. Dep. at 63). Dan Merrill, Jr. was a child born February 20, 1985, of plaintiff's union with Lynn. (Plf. Dep. at 23-24). Plaintiff described his relationships with T.J. and Dan, Jr. as "excellent." (Plf. Dep. at 26). Plaintiff testified that he and Dan,

Psychologist Zwart that at some time he had received Valium and Xanax prescriptions, but did not derive much benefit from them. Plaintiff related a history of excessive alcohol use. Plaintiff indicated that between 1983 and 1985 he drank excessively. Plaintiff reported that as of September 1999, he was able to drink one or two beers without any desire to drink more. *(Id.)*. Psychologist Zwart mentioned April 1992 I.Q. tests for which plaintiff had received a verbal IQ score of 138, a performance score of 146, and a full scale I.Q. of 146, all scores falling within the superior range. Plaintiff's only below-average scores had apparently been on the Digit Span Subtest measuring short-term auditory memory as well as working memory. Psychologist Zwart did not observe significant behavioral evidence of anxiety or depression. *(Id.)*. Plaintiff remained very focused during testing. Plaintiff was able to sustain attention without excessive wiggling or fidgeting. Plaintiff was "quite talkative" during the interview, but was not excessively loose or tangential. Psychologist Zwart found no significant behavioral evidence of any anxiety or depression. *(Id.)*. At the conclusion of this evaluation, Psychologist Zwart offered a diagnosis of ADHD and stated, "I would suggest that he meets the diagnostic criteria for

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Jr. exchanged e-mail approximately once a week, had telephone conversations once a month, and Dan, Jr. visited plaintiff on holidays and summer break. (Plf. Dep. at 27). Plaintiff described his relationship with his ex-wife Lynn as "excellent" and indicated that they were able to work out any issues relating to visitation of Dan, Jr. (Plf. Dep. at 27). Plaintiff had been married to Christine Smith in 1992 and 1993. Plaintiff testified during his deposition that Christine had a firey temper and hit him with an aluminum ladder when plaintiff indicated he was going to leave her. (Plf. Dep. at 22-23, 45). Plaintiff reported that he had not been in contact with Christine Smith since their divorce, but he was aware that she had remarried. (Plf. Dep. at 23, 27).

Dysthymic Disorder, a more low-grade chronic depression, marked by diminished self-esteem and confidence, pessimism and discouragement, irritability, and general low drive." *(Id.* at 1142). Plaintiff's mood shifts were not sufficient to suggest a bipolar disorder. Psychologist Zwart recommended that plaintiffdiscuss the possible pharmacological treatment with his family physician to address his reported ADHD symptoms and consider individual counseling. *(Id.)*. The September 30, 1999 report by Dr. Zwart did not include any diagnosis of Asperger's Syndrome. (Plf. Dep. 400; docket # 82, Ex. B). Plaintiff testified that he could not recall whether he ever gave a copy of this September 1999 report to BEPCO's Human Resources Director Diane Roodvoets. (Plf. Dep. at 399).

F. Plaintiff's "New Job Description" Proposal

On March 31, 2000, plaintiff sent an e-mail to Chuck Cowham proposing that BEPCO assign plaintiff a new job description. Plaintiff further requested that BEPCO make him a salaried employee rather than an hourly employee. In addition to requesting a salaried position, plaintiff asked to work fewer hours, and be provided with more paid vacation time. (docket # 86, Ex. 26; Plf. Dep. at 445). BEPCO declined plaintiff's invitation to create the new position plaintiff desired, which involved greater pay and less work. Plaintiff remained classified as a mechanical project engineer.

G. Plaintiff's May 2000 Request to Take Off "Stress Days"

On approximately May 1,2000, plaintiff had asked Human Resources Director Diane Roodvoets[4] about taking off stress days. (Plf. Dep. at 411).[5] At the time plaintiff requested his "stress days," plaintiff had not received an evaluation by any mental health professional indicating that he had Asperger's syndrome, (Plf. Dep. at 412), although his son had been diagnosed with Asperger's Syndrome by then. Plaintiff had referred himself to Psychologist Zwart to see if Zwart would likewise diagnose plaintiff as having Asperger's Syndrome. (Plf. Dep. at 400). Based upon what plaintiff had heard and read about the criteria for Asperger's Syndrome, plaintiff had by that time convinced himself that he would be diagnosed as having Asperger's Syndrome. (Plf. Dep. at 402; docket # 86, Bates-Stamped Ex. 1134). Plaintiff testified that as of May 2000 he was "very, very convinced" that he would be diagnosed with Asperger's Syndrome. (Plf. Dep. at 401-02, 411).

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[4] Diane Roodvoets testified at her February 18, 2004 deposition that she left her employment at BEPCO in October 2001 as a result of a corporate downsizing. (Roodvoets Dep. at 56).

[5] During this time period, the Internal Revenue Service was attempting to collect a tax debt of approximately $32,000 owed by plaintiff. (Plf. Dep. at 421-22). The record does not indicate that defendant was aware of plaintiff's financial difficulties. Plaintiff previously filed for bankruptcy in 1995 in an effort to discharge tax debts stemming from tax forms filed by plaintiff asserting that he was exempt from such taxes. (Exhibit attached to docket # 87).

H. Psychologist Zwart's May 8, 2000 Report

On May 8, 2000, plaintiff returned to Psychologist Zwart for a one-hour interview.

Plaintiff related that he had been researching Asperger's Syndrome on his own following his son's diagnosis. Plaintiff requested the interview to discuss the symptoms of Asperger's Syndrome and to obtain "diagnostic clarification." (docket # 86, Bates-Stamped Exs. 1134-36). Plaintiff reported that he had been taking Wellbutrin prescribed by his primary care physician, Dr. Sheila Van Lowe. Plaintiff indicated that this medication had "helped considerably" with his mood symptoms. (Plaintiffdid not submit any testimony or medical records from his primary care physician, Dr. Van Lowe, in support of any claims made in this lawsuit.) Plaintiff reported to Psychologist Zwart that he thought in "patterns" and stated that he had an uncanny ability to use all his senses to determine such patterns. Plaintiff asserted that he had been unable to pass his college engineering courses because formulas and facts in his tests appeared to be too random and made no "pattern sense" to him. Plaintiff complained that at this time, his young adult stepdaughter was living with him. She had proven to be a substantial irritant. Plaintiff reported that she "use[d] his stuff" and "upset his routines."[6] Plaintiff

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[6] Plaintiff had acted as the stepfather of Corinne's four children. All of Corinne's children had lived with the couple at one time or another, the youngest, Taylor James (a/k/a "T.J.") living with them the entire time they shared a residence. (Plf. Dep. at 25). During the period of roughly 1999 and 2000, Dan Merrill, Jr., plaintiff's son from a prior marriage, had also shared the same residence, but went back to live with his mother after completing eighth and ninth grades because of conflict with his step-mother Corinne. (Plf. Dep. at 25).

related that a stress at work was the prospect of having to earn his college degree "in order to get the job he [was already] doing." Plaintiff expressed concern that the engineering workspace might be reorganized and that in the process he might lose his private cubicle. Plaintiff related to Psychologist Zwart that he had an intense interest in fly fishing. Plaintiff stated that he tied his own flies and owned fifteen fly rods. Psychologist Zwart's written report does not contain any reference whatsoever to plaintiff's ongoing financial difficulties associated with IRS debt collection efforts. Based upon the symptoms that plaintiff reported, Psychologist Zwart stated that Asperger's syndrome was a diagnostic formulation that made sense for plaintiff, and the presence of the disorder in plaintiff's son "increas[ed] the likelihood that [plaintiff] could have it." Psychologist Zwart acknowledged having limited experience with adult Asperger's Syndrome. Psychologist Zwart summarized his "diagnostic impressions" as follows:

> Axis I: 299.80 Asperger's Disorder
> 314.0 Attention Deficit/Hyperactivity Disorder, combined subtype
> 300.4 Dysthymic Disorder

Psychologist Zwart's report concluded with a recommendation that plaintiff continue researching Asperger's Syndrome. Zwart stated that he would forward a copy of his report to plaintiff's treating physician, Dr. Van Lowe. Plaintiff stated that he was not sure what he was going to do with the report he had obtained from Psychologist Zwart. Zwart stated in his report that plaintiff was "fully aware that he may need to obtain accommodation under the Americans with Disabilities Act, and may need to be able to support his request for accommodation from his employer." (docket # 86, Bates Stamped Exs. 1134-36; docket # 82, Ex. B; Plf. Dep.

at 404). Psychologist Zwart did not venture to identify any specific limitation that would require accommodation, or how such accommodation might be accomplished.

I. Plaintiff's Actions Following Receipt of Zwart's May 8, 2000 Report

Plaintiff testified that "not long" after he obtained Psychologist Zwart's May 8, 2000 report, he took a copy of the report to Diane Roodvoets, BEPCO's Human Resources Manager. (Plf. Dep. at 389-90). Plaintiff acknowledged during his deposition that Psychologist Zwart's report did not indicate what accommodations, if any, plaintiff would require in connection with his employment at BEPCO. (Plf Dep. at 404). During his deposition on May 8, 2003, plaintiff expressed dissatisfaction that Diane Roodvoets had not demanded "clarification" of Zwart's report and apparently believed that Roodvoets should have requested some unspecified type of testing be undertaken to further evaluate the "impressions" Psychologist Zwart had listed in his May 8, 2000 report. (Plf. Dep. at 404-05).

Plaintiff testified at his deposition that the reason he gave Zwart's report to Diane Roodvoets was that he felt that the stress level on the job was getting to be too much for him to handle. Plaintiff stated that at this conference with Roodvoets he made the following requests: (1) to be allowed to keep working on AutoCAD instead of learning new computer system software; (2) that he receive what he described as "stress time"; and (3) that he receive "stress days" off work. (Plf. Dep. at 190, 397, 405). According to plaintiff, if he had a really hectic day at work, Tim Leep allowed plaintiff to leave work and take his work home with him, what plaintiff

called "stress time, stress days." (Plf Dep. at 405).[7] Plaintiff acknowledged during his deposition that he had never been provided with a hard deadline within which to learn BEPCO's 3-D software and that he never learned how to use such software. (Plf. Dep. at 407-08). Diane Roodvoets testified that her recollection was that plaintiff simply handed her Psychologist Zwart's May 8, 2000 report and that there wasn't any meeting. (Roodvoets Dep. at 22-24). She testified that plaintiff never made any request to be excused from learning three-dimensional software. He did not ask her about working hours different from other engineers or about the schedule for his breaks. (Roodvoets Dep. at 90).

Plaintiff testified that he continued to get up from his work station and walk around whenever he felt it was appropriate. He testified that he had never been told by anyone at BEPCO that he could not get up, stretch his legs, or go to the coffee pot to get a drink. (Plf. Dep. at 399). Plaintiff testified that during his employment at BEPCO, he was never disciplined for taking a break or relaxing at a time the company found to be unacceptable. (Plf. Dep. at 420).

On May 8, 2000, plaintiff sent an e-mail to Diane Roodvoets at approximately 1:50 p.m. The subject was identified as "Our talk last week." The body of plaintiff's message stated, "Were you able to find any information on my 'stress days' request? Does BEP get reimbursed for any accommodations like this that are made?" (docket # 86, Bates-Stamped Ex. 1260). Plaintiff was under the impression that

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[7] Tim Leep testified that "stress time" was not terminology he used as plaintiff's supervisor. Leep acknowledged telling plaintiff that if he needed to take a walk around the shop once or twice a day to "get his head back into shape," Leep did not object. (Leep Dep. at 103).

BEPCO might qualify for some sort of favorable tax treatment if it allowed plaintiff to take paid absences from work in the form of "stress days." Diane Roodvoets testified that this was part of an ongoing conversation that started with plaintiff's request for more paid vacation time. When Roodvoets responded that additional paid vacation time was unavailable, plaintiff mentioned that he received "some sort of financial something from a government or the IRS, a credit maybe for his son having a condition" and that he wanted Roodvoets to investigate to see if BEPCO could receive a credit for providing plaintiff with "stress days" where he did not have to work. (Roodvoets Dep. at 24). Roodvoets testified that plaintiff had the worst attendance record in the company. *(Id.*. at 74). She testified that in her interaction with plaintiff, she did not ever recall seeing plaintiff in his cubicle hunched over his board. Roodvoets did observe plaintiff walking around with his hands in his pockets and saw him sitting on the end of Kurt Kindig's desk. *(Id.*. at 73-74). Roodvoets testified, "I don't think I ever saw him working." *(Id.* at 74). "Dan didn't work very hard. He had lots of days off. He wanted to be fly fishing." *(Id.* at 75). Roodvoets believed that plaintiff had used up his vacation time, and when she told him he would not receive more, he tried to get more time off through alternative means. She believed that plaintiff was "trawling" for more time off. She "didn't relate it to his thought that he had Asperger's. It was more related to wanting the time off...." *(Id.* at 75). On May 12, 2000, Roodvoets responded to plaintiff's May 8, 2000 e-mail by stating, "We are in the process of researching . . . ." (docket # 86, Bates-Stamped Ex. 1260). Ultimately, BEPCO determined that no such beneficial tax treatment existed (Roodvoets Dep. at 29), and plaintiff's request for additional paid leave and/or unpaid leave of indefinite duration in the form of "stress days" was denied. (Roodvoets Dep. at 67).

J. E-Mail Regarding Work Hours

On May 10, 2000, Tim Leep sent an e-mail addressed to the members of the "EOL Group" regarding "working hours and consistent starting and stopping times each day where possible." Tim Leep indicated that after he had received responses from the members of the end of the line group and consulted with them, Leep would post the results of the survey so that everyone within the group would have a better picture of the hours their co-workers would be present. Plaintiff responded to Leep's e-mail as follows:

> Tim, I did not want to have a 6:00 - 6:30 AM start time, it was forced down my throat without any consideration at all, this was supposedly in order to support the shop in case they had any questions, which they rarely did. Now that I live where I live [Newaygo, Michigan], it is a benefit to me in order to avoid heavy traffic problems (which adds even more stress to my day). When working 40-45 hours a week, I still get home in time to get my kids off the bus, and someone is there to cook supper. If they have to wait for my wife, they do not get supper until 7:00 - 7:30 PM. This is not acceptable to them or me.

Tim Leep responded that he remained supportive of plaintiff's desire for flexible work hours, but Leep still needed to know how plaintiff's work hours would fit into the overall picture for the end of the line group. (docket # 82, Ex. B; Plf. Dep. at 412-13).

K. Plaintiff Requests a Transfer to Avoid Working for a New Supervisor

In approximately July 2000, BEPCO hired Munir Ozdemir to manage its "end of the line group." Ralph Palmer was Mr. Ozdemir's supervisor. Ozdemir held a Ph.D. in mechanical engineering and was brought in by BEPCO to replace Tim Leep and address problems with BEPCO's end of the line group, most notably the group's problem of completing machines beyond applicable deadlines. (Palmer Dep. at 36). Munir Ozdemir was plaintiff's immediate supervisor. (Palmer Dep. at 18). Plaintiff stated that even though he was assigned to the end of the line group, he had performed only limited projects for that group. Plaintiff stated that he made an initial design for a master gauge for an alignment machine called a rolling master in an AutoCAD 2-D format that he handed off to others to convert into three dimensions. Plaintiff also worked on a project converting an old GM rolling master to a different type of axle system. (Plf. Dep. at 176). Plaintiff described his rolling master work as a "fiasco," resulting in BEPCO's wasting a couple of thousand pounds of metal. Plaintiff indicated that he was not having any conversations with his supervisor Munir Ozdemir, and plaintiff was concerned about what would happen if Ozdemir completed plaintiff's year 2000 performance review. (Plf. Dep. at 178-79). Plaintiff testified that he never had a "complete" conversation with Ozdemir. Plaintiff stated that he had heard that Ozdemir was a "math whiz," and sought to have Ozdemir verify his frequency calculations for components. Ozdemir responded that it was a waste of time and refused, from which plaintiff concluded that Ozdemir "didn't understand the value of the frequency components on a dynamometer." (Plf. Dep. at 167).

Plaintiff was responsible for a number of problems in machine design. One was a Hundai tandem axle roll brake machine. This machine's belt tensioner broke on several occasions. The machine's rollers caused damage to the tires of the Hundai vehicles being assembled by taking chunks out of the tires. BEPCO had to send numerous service representatives over to Korea to address the multitude of "issues" this machine presented. Plaintiff described this particular machine as a "service nightmare." (Plf. Dep. at 246-52, 278-82). On a GM machine at Milford, Michigan, the centering lift failed, and the four-wheel drive restraint system failed. (Plf. Dep. at 231-32). On a Ford auto-chock system, the scissor mechanism used to chock the tires kept flipping over because in designing the system, plaintiff had "missed one axis." (Plf. Dep. at 288). The same machine could not accommodate tires up to 36 inches as Ford had specified. (Plf. Dep. at 291-92). The machine had been intended by Ford to enable it to test vehicles more rapidly, by allowing Ford to get vehicles on and off the dynamometer without having to manually attach restraints to each vehicle. (Plf. Dep. at 294). Plaintiff did not provide the assemblers with assembly process directions on a Kia rolling master. This resulted in a problem which allowed a tire to loosen and required that a service representative be sent to perform repairs in Korea. (Plf. Dep. at 326-28). A torque transducer plaintiff had specified for a Delphi dynamometer turned out to be inadequate. It had to be replaced at the customer's plant located in Rochester, New York. (Plf. Dep. at 340-41, 513; see Palmer Dep. at 24-34; Palmer Aff. ¶ 2). Ralph Palmer indicated that he was not aware of any mechanical project engineer at BEPCO whose designs had problems as severe and as frequent as the problems with the machines plaintiff designed. (Palmer Aft. ¶ 3).

On August 7, 2000, at approximately 12:19 p.m., plaintiff sent an e-mail addressed to Diane Roodvoets. The subject line of the e-mail stated, "Asperger's Condition Bears Gifts, Frustrations: Washington Post."[8] In the body of his e-mail message, plaintiff stated as follows:

> Check this out, these are all the same reasons that I could not get a BA in engineering. I can do the work better than most (without studying), but I cannot take the timed tests.
>
> My IQ is far beyond this guy and I graduated high school with a D average.
>
> This condition is self-diagnosed or officially diagnosed in every single member of my family, is your condition the same way?

On Tuesday, August 8, 2000, at approximately 7:41 a.m., Diane Roodvoets sent this brief reply: "Very interesting! I can see how frustrating it could be." (Roodvoets Dep. at 43; docket # 86, Bates-Stamped Ex. 1259).

In the fall of 2000, Munir Ozdemir contacted Ralph Palmer. Ozdemir indicated that he did not believe that plaintiff fit into the end of the line group. Ozdemir could not get adequate productivity from plaintiff and expressed concern that plaintiff was unable to do the work that Ozdemir needed

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[8] Plaintiff has submitted an affidavit stating that he provided an article from the July 31,2000 issue of *Newsweek* regarding autism to Diane Roodvoets "before May 2000." (Plf. Aff'. ¶ 2 & attachment, docket # 86). Plaintiff offers no explanation how he was able to provide Diane Roodvoets with this July 31, 2000 article months before it was actually published.

plaintiff to accomplish. Palmer advised Ozdemir to try to continue working with plaintiff. Plaintiff remained in the end of the line group. (Palmer Dep. at 19).

While plaintiff was still under Ozdemir's supervision, he made a request to move into BEPCO's support group. (Plf. Dep. at 454). BEPCO's support group, a group whose primary responsibility included creating and checking manuals and other non-engineering functions, did not have or need any mechanical project engineers. (Plf. Dep. at 456). Shortly after plaintiffrequested a transfer, Fred Ray of the dynamometer group announced his retirement. (plf. Dep. at 455).

An engineering managers' meeting was held in the fall of 2000 with Ralph Palmer, Munir Ozdemir, John Clawson, Yin Wen, Roger Wyse and Tom Schmidt in attendance. Munir Ozdemir indicated that he was still not getting adequate production from plaintiff. Ralph Palmer asked the other managers if they had a place for plaintiff within their groups. John Clawson, manager of the dynamometer group, agreed to take plaintiff into the open position in his dynamometer group created by Ray's retirement. (Palmer Dep. at 20). Although plaintiff technically remained assigned to the end of the line group until December 2000, plaintiff performed work on loan to BEPCO's dynamometer group. (Plf. Dep. at 178-79).

On November 8, 2000, plaintiff and his wife Corinne began counseling with Gailord C. Weeks, Ph.D. (Weeks Dep. at 9). The primary focus of Psychologist Weeks' counseling did not relate to plaintiff's employment, but rather "management issues within the home, either conflicts with his wife, different life issues in terms of where he was going to live." Weeks characterized any references to plaintiff's work

as "incidental." (Weeks Dep. at 21-22, 32).[9] Plaintiff's marriage was deteriorating and plaintiff was having difficulty interacting with one of his children. (Weeks Dep. at 38). Weeks testified that "within the home," plaintif had difficulties with social behavior and interpersonal behavior. (Weeks Dep. at 24).

Plaintiff testified at his deposition that he had two separate meetings at BEPCO in late 2000, but was "kind of fuzzy" about which happened first. (Plf. Dep. at 180). One meeting was with Ralph Palmer and Diane Roodvoets and the other meeting was with Palmer, Roodvoets and Tim Leep. (Plf. Dep. at 180). Plaintiff testified that he had a meeting with Diane Roodvoets and Ralph Palmer and inquired about the possibility of being moved from Munir Ozdemir's group to another group. (Plf. Dep. at 465). Plaintiff testified that he requested the transfer because he was not comfortable with the prospect of Munir Ozdemir performing plaintiffs performance appraisal. (Plf. Dep. at 421-22, 464-65). Plaintiff sought a transfer back to a former manager with whom he had a work history. Plaintiff asserts that he asked that he be allowed to continue to utilize the two-dimensional AutoCAD program. Plaintiff "didn't mention the stress phase at that time." (Plf. Dep. at 467). Plaintiff testified that he did not recall telling Roodvoets or Palmer that Asperger's was a reason plaintiff wanted the transfer. (Plf. Dep. at 468).

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[9] Plaintiff testified that he got along fine with purchasing manager Bob Boidell and other employees in BEPCO's purchasing department. (Plf. Dep. at 132-33). Plaintiff testified that he and Curt Kindig, BEPCO's manager of quality control, "talked a lot." They went to lunch together roughly once a week, and also went fishing together. Plaintiff testified that on occasion he had co-workers over to his house and attempted to teach them fly fishing. (Plf. Dep. at 211-12).

Plaintiff states that at the meeting with Diane Roodvoets and Ralph Palmer plaintiff mentioned that he had Asperger's Syndrome. Plaintiff stated that he presented Asperger's Syndrome as a strength, but also acknowledged some weaknesses. Plaintiff gave as an example that he did not tend to socialize as much as other engineering people, therefore he was a pretty big asset to the company because he did not lose as much time to socialization. (Plf. Dep. at 183). Plaintiff testified that he told people at BEPCO that his condition gave him the ability to envision machines and concepts in his mind that other people could not. *(Id.)*.

Q. Well, when you say you informed Diane and Ralph that you had Asperger' s, what did you tell them about the condition, if anything. Did you just say, "I have this condition and it's called Asperger's Syndrome?"

A. I told them it's a form of autism, except with a high I.Q. You don't communicate with people, depending on the person. I have -- my mind operates on different levels at the same time, and sometimes it's hard to keep one slowed down enough to communicate without jumping around in a sentence. And that sometimes I get stressed. I need to just go for a walk, walk it off, get everything back on the same plane and get back to work.

Q. Okay. And you told all that to Diane and Ralph. Is that your testimony?

A. Yes. I also told Diane about the Auto CAD, about how when most of the kids at Superior Concepts could take a one-week course and they would be

off and be productive in AutoCAD, that I did it for a couple of months, couldn't do it, and I had to write the commands out on my own and leave them alongside my drawing board while I was working for six months, and I'd run the commands through my mind while I was drawing, and that allowed me to just sit down and work AutoCAD after that point.

And I told them that Burke Porter was using -- or they had CADkey as a primary, then they were changing to Desktop as a primary, then they were changing to Inventor as a primary, and that it would probably take me a year or more to learn each one, and every -- they were just changing constantly.

I said, "It's impossible for me to do that. If they got one and stuck with it and give me time to learn it, I can do it, but I'm going to be the speed of a detailer for a long time until I grasp it."

Q. Well, you were allowed to continue to work in two-dimensional AutoCAD the time you were there, were you not?

A. Yes.

Q. But you were encouraged to do what you could to move to the three-dimensional programs?

A. Yes.

(Plf. Dep. at 186-87).

On November 10, 2000, a meeting occurred with plaintiff, Tim Leep, Diane Roodvoets, and Ralph Palmer present. (Plf. Dep. at 514). Tim Leep could not recall whether Asperger's Syndrome had been discussed at this meeting. (Leep Dep. at 62, 103). At the time this meeting occurred, plaintiff was assigned to the end of the line group. During this meeting plaintiff indicated that he wanted to do more research and development work and to work under Chuck Cowham's supervision. (Leep Dep. at 62). According to Leep, plaintiff indicated that he was seeking reassignment because he was concerned about evaluations he might receive from the end of the line group manager, Munir Ozdemir. (Leep Dep. at 65). Diane Roodvoets likewise recalled that this meeting was primarily about plaintiff's inability to work with Munir Ozdemir, his desire to work more closely with Chuck Cowham, and plaintiff's desire "to return to some R & D role." (Roodvoets Dep. at 55-56). Plaintiff testified that this meeting involved his request to have someone other than Ozdemir perform his year-end performance review. (Plf. Dep. at 178-79, 464). Ralph Palmer recalled that plaintiff had been upset that his supervisor Munir Ozdemir did not believe that he was capable. Palmer, having fielded Ozdemir's complaints, knew that plaintiff's supervisor did not believe that plaintiff was capable. (Palmer Dep. at 50). Plaintiff began talking about his capabilities and indicated that he wanted to work in the areas of cost cutting and special projects. Ralph Palmer responded that it sounded like plaintiff either wanted Chuck Cowham's position or a job working under Cowham's supervision. The issue of the year-end performance review by Munir Ozdemir was brought up. Plaintiff indicated that up to this point, Ralph Palmer had been working on his computer and working on other things while they talked. When plaintiff brought out the specific request to have someone other than Ozdemir perform the year end review, Palmer replied, "Finally you said something of substance." (Plf. Dep. at

470). This led to the proposal to transfer plaintiff to the dynamometer group, which appeared to relieve plaintiff. (Palmer Dep. at 52). According to Palmer, after the transfer was proposed, plaintiff began talking about a variety of things. It was at that point that Ralph Palmer for first time heard the word Asperger's Syndrome, and the first time Palmer became aware that plaintiff believed he had Asperger's Syndrome. (Palmer Dep. at 49-52). Palmer recalled that plaintiff emphasized his genius, and described his type of genius as Asperger's. (Palmer Dep. at 52, 60). Plaintiff testified that he could not recall making any requests at this meeting of any specific thing that BEPCO could or might do for him. (Plf. Dep. at 469). Plaintiff mentioned having difficulty learning computer programs. (Plf. Dep. at 472). There was no conversation about plaintiff having dysthymia or a dysthymic disorder. (Plf. Dep. at 472; PalmerDep. at 55). Shortly after this meeting, plaintiff was transferred into the dynamometer group. (Palmer Dep. at 53). Palmer testified that he was not aware of plaintiff making any request for accommodation based upon having Asperger's Syndrome. (Palmer Dep. at 69).

Plaintiff testified that there was no conversation in either meeting regarding dysthymia or a dysthymic disorder. (Plf. Dep. at 472). Plaintiff testified that after his meeting with Leep, Roodvoets and Palmer, he did not have any conversations about Asperger's Syndrome with Ralph Palmer, Andy Murch, or Tim Leep and could not recall having any further conversations with Diane Roodvoets. (Plf. Dep. at 474-75).

L. Denial of a Request to Work on a Project

Plaintiff testified that he always kept a picture of Albert Einstein on the wall in his office. Plaintiff testified that he did

not believe that he had "verbalized" the analogy of himself to Einstein and Einstein's genius capacity, yet eccentric ways. (Plf. Dep. at 418). According to Diane Roodvoets, conversations with plaintiff were often laced with plaintiff's references to himself as being a "genius" or "really smart." (Roodvoets Dep. at 71). Plaintiff states that sometime after the meetings with Roodvoets and Palmer, he expressed a desire to work on a particular project. Ralph Palmer purportedly responded that he did not believe that plaintiff was capable of performing the work required on this particular project. Plaintiff then sought to enlighten Palmer by stating something to the effect of "I've got a lot of aptitude on machinery, I've got a I.Q. of 146," and "I'll give you copies if you want it." Ralph Palmer's response was something to the effect that no amount of documentation would prove to him that plaintiff was not "f___ing stupid." (Plf. Dep. at 182, 372-74). Plaintiff stated that at various times he had informed Palmer and others that he had "genius level intelligence" and claimed that he could "envision machines and concepts in [his] mind in ways that other people couldn't." (Plf. Dep. at 183-84).

M. Reassignment to the Dynamometer Engineering Group

On December 11, 2000, plaintiff was formally reassigned to the dynamometer engineering group filling the vacancy created by Fred Ray's retirement. (Plf. Dep. at 384-85; docket # 82, Ex. B; docket #86, Ex. 33). Plaintiff requested that he be allowed to remain in the same work area he had occupied prior to the transfer. BEPCO approved plaintiff's request. (Plf. Dep. at 38485). Plaintiff's year-end performance review for 2000 was completed by John Clawson. (docket # 86, Bates-Stamped Exs. 315-17; Plf. Dep. at 178-79). The report noted plaintiff's transfer to the dynamometer group. It indicated that plaintiff was "sharing

design responsibilities with Dan Banas on a new 4WD MIM design." The report emphasized that the project required "significant coordination and sharing of information and concepts to avoid future build problems." The year 2000 appraisal noted plaintiff's problem of relying too heavily upon others to check his work: "Dan has relied on subordinates to handle assembly and checking, problems have been experienced in this practice. This falls under lessons learned; additional self checking should occur in future projects where appropriate." "Additional checking of design, increased self-checking opposed to complete reliance on checker" was listed as a goal for plaintiff to attain during the next review period. Also listed among the goals was for plaintiff to produce layouts and 3-D models utilizing BEPCO's standard 3-D drawing software. Plaintiff was advised to divert from his current practice which was limited to working in 2-D AutoCAD. The performance review noted that plaintiff specifically needed to improve in "3D modeling in the BEP standard CAD package" and vibration analysis. The performance review indicated that plaintiff' s productivity had been adversely affected by the 115.50 hours of sick time plaintiff had taken through November 9, 2000, and by his being underutilized during the year by the end of the line group. (docket # 86, Bates-Stamped Exs. 315-17).

In approximately April 2001, BEPCO transferred John Clawson from his position as manager of the dynamometer group to manager of application engineering. John Clawson did not take plaintiff with him into the application engineering department. Plaintiff stated that he never told Clawson "about Asperger's." (Plf. Dep. at 427, 433). After Clawson's transfer, the members of the dynamometer group, including plaintiff, began reporting directly to Engineering Manager Ralph Palmer. (Palmer Dep. at 21-23; Plf. Dep. at 427, 542).

Just a few weeks prior to Clawson's transfer, plaintiff had discussions with Ralph Palmer (John Clawson's boss) regarding a problem with a MIM dynamometer in which standard English measurement (SAE) components and metric components had mistakenly been incorporated into the same machine. (Palmer Dep. at 32; Plf. Dep. at 428). Plaintiff had designed his portion of the project with SAE components. The person working on the other portion of the machine had used metric components. Plaintiff characterized his conversation with Ralph Palmer as follows:

> Q Did it occur to you that Ralph, as engineering manager, might still be unhappy that the company was shipping out a machine with inconsistent fasteners?
>
> A Well, Ralph and I had talked about it a little bit that day before, and I tried to explain that you don't really ship out an all-metric machine or an all-SAE machine. If the customer wants a metric machine, we ship them a SAE machine, but change the fasteners to metric. That still has a lot of SAE components in it: air cylinders, clutches, brakes, motors and so forth.
>
> And so it's kind of a gray area that the company exists in. There's still metric and SAE fasteners on all our machines. Even the MIM, which is technically an all-metric machine, still has SAE components on it: encoders, roll brakes, a lot of fasteners, just odds and ends.
>
> I mean, yes, I will admit having the frame basically metric and having the MIM basically SAE was not good.

(Plf. Dep. at 430-31). Ralph Palmer indicated that he wanted the machine redesigned for either metric or SAE use. (Plf. Dep. at 485). The machine was not redesigned. After Palmer brought the problem to plaintiff's attention, plaintiff discussed the matter with Palmer's subordinate, John Clawson. Plaintiffand Clawson had agreed that it was too late to make any changes to the machine. (Plf. Dep. at 428). When Palmer asked plaintiff about this machine the next day, plaintiff's response was "Status quo. Nothing's changed." Palmer's response was something to the effect of "Status quo is all f____ ed up. What the hell's wrong with you?" (Plf. Dep. at 428). Plaintiff testified that he walked away. (Plf. Dep. at 485-86). Plaintiff's deposition testimony characterized the assembly of the Milford MIM with a dynamometer utilizing SAE fasteners and metric fastener framing as a "fiasco." (Plf. Dep. at 471).

In April 2001, plaintiff was experiencing significant financial difficulty regarding a tax debt of approximately $32,000 the IRS was attempting to collect. Plaintiff's contemporaneous e-mails from work to various organizations indicate that the IRS was threatening to take plaintiff's home. Plaintiff believed that he was "in immediate danger of losing everything [he] own[ed.]" Plaintiff's attorneys had advised him to file for bankruptcy. Plaintiff related that he had filed for bankruptcy in 1995, and he wanted to avoid doing it again, and "being screwed for another 10 years." In his e-mails dated April 26, 2001, and April 27 2001, plaintiff described his situation as "extremely desperate" and "very desperate." (April 26, 2001 and April 30, 2001 e-mails, attachments to docket # 87; Plf. Dep. at 422-23,504).[10]

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[10] Plaintiff testified that he eventually elected to file a second petition for bankruptcy in April 2002 and sometime thereafter obtained a discharge on this debt of approximately $32,000 owed

BEPCO allowed plaintiff to utilize its computer and Internet connection to perform personal research. BEPCO did not object to plaintiff researching Asperger's Syndrome and never restricted plaintiff's ability to correspond by e-mail with others outside the company. Plaintiff was never monitored by anyone at BEPCO to determine whether plaintiff was limiting his non-business research to his break periods. (Plf. Dep. at 419; attachments to docket # 87). On or about May 2, 2001, plaintiff sent an e-mail to Diane Roodvoets which stated, "Diane, I found this on the net and thought that you would like a copy." Diane Roodvoets did not characterize this exchange as a dialogue. She characterized it as plaintiff shoving information about Asperger's Syndrome in her face. (Roodvoets Dep. at 47).

N. E-mail Request to Leave Work at 12:45 p.m.

At approximately 9:19 a.m. on May 4, 2001, plaintiff sent an e-mail addressed to John Clawson, with a copy to Clawson's supervisor, Ralph Palmer, the subject being "going home at 12:45 today." (Bates-Stamped Ex. 004, docket # 86; Plf. Dep. at 508). The body of plaintiff's message indicated that his 40 hours for the week would be completed by 12:45 p.m. Plaintiff testified that he was paid time-and-a-half for work after forty hours and that at various times during his employment, BEPCO had sought to manage and limit such overtime expenses. (Plf. Dep. at 445). Ralph Palmer responded to plaintiff's May 4, 2001 e-mail at approximately 9:32 a.m., stating, "OK Dan and if this slow down keeps up, please plan on keeping to the core time next week of 8:30 to 3:30." (Plf. Dep. at 442). At approximately 9:30 a.m., plaintiff sent the following e-mail message to Ralph Palmer:

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to the IRS. (Plf. Dep. at 422-23).

> For about 3-1/2 years now, I have been starting at 6:00 - 6:30 A.M. This was "demanded" of me at first so that someone was here to represent Engineering if the shop had any questions or print problems between 6:00 AM and 8:30 AM. Most of Engineering arrives between 8:00 and 9:00, there would be no shop support if someone doesn't start earlier.

Ralph Palmer responded to this e-mail at approximately 10:42 a.m. stating, "You will work according to the Hand Book as will everyone else. Exceptions will be handled on a job by job basis." (docket # 86, Bates-Stamped Ex. 004; *see* Plf. Dep. at 435,442-43, 508, 511; docket # 82, Ex. B). Plaintiff left work early more often than other engineers. (Plf. Dep. at 375). Plaintiff testified at his deposition that he was aware that when he left work early in the afternoon, on several occasions, co-workers needed to contact plaintiff but were unable to reach him. Plaintiff acknowledged the potential for problems if co-workers in fabrication or assembly or the detailers working on projects that plaintiff had designed wanted to discuss problems with plaintiff, only to discover that plaintiff had left work early for the day. (Plf. Dep. at 271). BEPCO's core hours were from 8:30 a.m. to 3:30 p.m. (Plf. Dep. at 450). Plaintiff could not recall whether the reason he wanted to leave early that Friday, May 4, 2001, was to go fishing for steelhead. (Plf. Dep. at 62, 71-73, 449). Plaintiff was aware that he could start work at BEPCO before 8:30 a.m. or stay after 3:30 p.m., as long as he kept to the core time between 8:30 a.m. and 3:30 p.m. (Plf. Dep. at 435-36, 510). Plaintiff was allowed the flexibility to arrive and depart as he desired, as long as he was present during the core business hours. Plaintiff was free to flex the remaining non-core hours to complete his 40-hour work week. (Plf. Dep. at 435-36, 510-12).

On May 4, 2001, approximately twenty-five minutes after receiving Ralph Palmer's response that plaintiff could leave early but should generally plan on working core hours, plaintiff sent an e-mail to Roger Riggs. According to plaintiff, Mr. Riggs was someone who had initially pushed to have plaintiff start work early. Plaintiff was hoping that Riggs would support plaintiff's request to continue to arrive and leave early. (Plf. Dep. at 448-49, 508). Roger Riggs responded that it was unnecessary for plaintiff to arrive and leave early. "Shop support will always be a priority but we shouldn't need it day in and day out between 6:00 & 8:00. If we need that much support, I would think something is seriously wrong." (docket # 82, Ex. B; Plf. Dep. at 448-49, 512). Plaintiff responded by stating, "Sorry, I should have been more specific, by shop support, I meant the lab, machine and panel build departments. This support is usually wrong or missing dimensions and damaged prints." (docket # 82, Ex. B). Riggs concluded this e-mail discussion with the following statement: "I was clear about shop support. My point was we shouldn't have that many prints with wrong or missing dimensions. It's crazy to have a system that supports errors rather than fix problems in the first place." *(Id.)*. Plaintiff acknowledged receipt of Riggs's response that BEPCO's manufacturing group did not need plaintiff or other engineers to be present in the early morning hours to assist them. (Plf. Dep. at 512). Plaintiff testified that he continued to prefer to arrive early and leave work early because he encountered less traffic during those hours, there was less noise in the office, and plaintiff believed that he was more productive working early morning hours. (Plf. Dep. at 437, 514-15).

O. Break Times

Plaintiff testified at his deposition that about the same time, he told Ralph Palmer that Tim Leep had allowed

plaintiff to take break times and lunch breaks whenever he wanted. Plaintiff claimed that he would forget about break times and lunchtime and that it was common for him to work through these breaks. According to plaintiff, Palmer advised plaintiff to keep to scheduled breaks and lunch times. (Plf. Dep. at 443-44). Plaintiff testified that if he came in by 6:00 a.m., he qualified for an "extra" morning break. (Plf. Dep. at 444). Plaintiff testified that keeping workers to their scheduled breaks was an "ongoing management problem," particularly with smokers. Defendant never disciplined plaintiff for taking unscheduled breaks or remaining on a break beyond the time interval scheduled for breaks. (Plf. Dep. at 444).

P. Work Under Ralph Palmer's Supervision

Sometime after John Clawson's April 2001 transfer, during the period plaintiff was reporting directly to Ralph Palmer, someone in BEPCO's shop had expressed concern that a pivot bolt on a motorcycle dynamometer was too small and suggested that it be redesigned. Ralph Palmer asked plaintiff about the problem. Plaintiff described his conversation with Ralph Palmer in these terms:

> And Ralph came to me and talked - asked me about it, and I explained to him that the bolt had less than a thousand pounds of load on it and that the shoulder bolt had a shear strength of over- way over 100,000 pounds. He wanted to know exactly what the - he asked what was the load capability as used, because it wasn't a true shear and it wasn't a true tension, and I told him it really doesn't matter. I mean, with a 100 to 1 strength ratio - I mean, you don't calculate everything on a machine, and it wasn't worth talking about. And he got real upset that I

> hadn't calculated the strength of every bolt on the machine, like he thought that was – it was normal to do that. And, God, if you did that, it's take you ten years to build a machine.

(Plf. Dep. at 477).

Plaintiff also mentioned another meeting where Wayne Brock had complained that on a four-wheel dynamometer, plaintiff had specified a non-standard tap that BEPCO did not keep in stock. Sometime prior to a May 9, 2001 group meeting scheduled to discuss this problem, Ralph Palmer had asked to see plaintiff's load calculations regarding this part. Plaintiff's response to his supervisor was that there was not any load to calculate. Plaintiff stated at his deposition that Palmer became upset because plaintiff "hadn't done this mythical calculation." (Plf. Dep. at 480). Wayne Brock wanted to change the tap to a standard size that BEPCO did have in stock. (Palmer Dep. at 30). According to plaintiff, by the time the May 9, 2001 meeting occurred, "we were already getting in the castings and they were already cored with the proper hole size for the Acme screw that I was using. So it was a moot question. I mean, we had to use the one I spec'd because we were way beyond any decision at that time." (Plf. Dep. at 481). At the meeting, a conclusion was reached that it was simply too late to change the part in question. (Plf. Dep. at 481). Because BEPCO did not have in stock the part that plaintiff had specified, work on the machine was interrupted until the part arrived. (Plf. Dep. at 482-83). According to plaintiff, when Ralph Palmer stated that he was not happy with plaintiff's use of the non-standard tap, plaintiff "countered with, well, it might be nonstandard here, but it is standard in the industry and the screws were standard." (Plf. Dep. at 481).

Palmer had not attended the May 9, 2001 meeting but afterwards, on May 11, 2001, Palmer sent the following e-mail to plaintiff, with a copy to John Clawson, under the subject heading "Tooling:"

> Dan, I do not think that was their point. It was that they had to do it at all. I tried to keep this out of the personal level and get you to stick to the technical side of things and quantify it. The closest you came was some half admission that there would not be a magic setting that could be easily accomplished by the operator and a cost analysis that in my opinion had no relevance to the argument.
>
> They have 1"5 taps on hand, contrary to your e-mail to me.
>
> Also, I understand there was a meeting Wednesday and it got ugly. (info from John and Bob) This is the worst of it all. We can not afford to have people tearing each other down and stifling ideas. I understand you were not doing this and that is good.
>
> I do not think I really understand what is going on with you and your working relationship with other people here but the situation has to improve. You can only do your part of course and I can not hold you responsible for other people being unreasonable but I can not imagine how the SAME guy could send an e-mail on Wednesday concerning reviews with the shop as if it were some "new" idea and as if he just could not wait to work and improve working with them and two hours later getting into a big pissing match over 1"5 Vs 1"10 taps for a restraint system.

> Any comments? Refute my opinion but do not dismiss it out of hand. We will come to an understanding.

(docket #86, Bates-Stamped Ex. 1261).

On June 7, 2001, plaintiff sent an e-mail to Ralph Palmer asking when classes would be offered on the "Inventor" computer program. Palmer replied by e-mail stating that everyone else had turned down the class offer, but if plaintiff believed that he could not learn Inventor from the manual and his teammates, he should contact Palmer. (Bates-Stamped Ex. 3, docket # 86).

Q. Termination from Employment

On June 8, 2001, Al Preisner, BEPCO's floor assembly manager, contacted Director of Engineering, Ralph Palmer. (Palmer Dep. at 41). At that time, plaintiff was in his cubicle using the company's computer. Palmer came into plaintiff's cubicle and advised plaintiff to follow him out to the machine shop. (Plf. Dep. at 360). The motorcycle dynamometer in question that plaintiff had designed was already substantially over its allotted engineering hours. (Plf. Dep. at 362, 521). According to plaintiff, a few days earlier Palmer had asked him to look over "something" on this machine because someone in the machine shop had indicated they did not like it, or something to that effect. Plaintiff testified that he reviewed the centering system with Todd Menkveld and no changes were made to the machine. (Plf Dep. at 360, 365). When plaintiffarrived on the shop floor on June 8,2001, Al Preisner was standing at the tool table next to the mill. Preisner stated that there was a hole pattern missing a part. (Plf. Dep. at 521-22). Plaintiff looked over the machine and responded, "Yep, you're right." (Plf. Dep. at 522). Because the part was missing a bolt pattern it could not be assembled

as plaintiff had drawn it. (Plf. Dep. at 360-61, 525). Ralph Palmer asked plaintiff what he was going to do about the problem. Plaintiff testified that he responded that he would go back to his cubicle, look at the drawings and figure out the proper hole pattern or fix whatever it was, and that he would let Palmer know what had to be done. (Plf. Dep. at 522; docket # 86, Ex. 45). Palmer asked Preisner if Palmer and plaintiff could "have a minute" and Mr. Preisner walked away. Ralph Palmer then questioned plaintiff about why there were always so many mistakes on his jobs. Plaintiff responded that, in his mind, it was inexcusable that after making possibly 100 model 3600 machines they were still having to "re-work" them. Plaintiff also indicated that his projects were custom jobs and prototypes that always seemed to have a tight time line. Plaintiff stated that he had to rely on checkers to do their jobs and that he did not have any control over that. Ralph Palmer then told plaintiff that he thought that plaintiff was "technically incompetent" and that plaintiff couldn't "draw worth a shit." (Plf. Dep. at 522; docket # 82, Ex. B; docket # 86, Ex. 45). Plaintiff stated that he perceived this as "an obvious personal attack." (Plf. Dep. at 525). Plaintiff responded to his supervisor by stating something to the effect of "How would you know." (Plf. Dep. at 522). Plaintiff believed that his supervisor, Palmer, was not competent to read plaintiff's drawings. (Plf. Dep. at 522, 526). Notes plaintiff made later in the afternoon on June 8, 2001, asserted that, as plaintiff was leaning over the tool bench with his head hanging down, plaintiff "gave a nervous 'chuckle' and then turned his head towards Ralph Palmer and said, 'Ralph, you are out of line.'" (docket # 82, Ex. B; docket # 86, Ex. 45).

According to plaintiff, Ralph Palmer did not take the "How would you know" retort as a question. Ralph Palmer perceived this as an attack on his authority as plaintiff's

supervisor. Palmer began getting louder and louder and did a lot of swearing. (Plf. Dep. at 523). Palmer allegedly stated, "Dan, I can fire you. Drag your f____ing ass out of here anytime I want." (Plf. Dep. at 523; docket # 86, Ex. 45). Plaintiff did not believe that he immediately responded to this statement, but did admit stating to Palmer something to the effect of, "You won't get away with it." (Plf. Dep. at 523; docket # 82, Ex. B). Palmer determined that plaintiff would not recognize that he had deficiencies in the quality of his work, would not work with Palmer to address those problems, and would not accept Palmer as his boss. (Palmer Dep. at 37). Palmer made the decision to terminate plaintiff's employment. (Murch Dep. at 31). At approximately 11:30 a.m., Ralph Palmer led plaintiff out of the shop area and escorted him to the office of Human Resources Director Diane Roodvoets. (Plf. Dep. at 527; Palmer Dep. at 46). Roodvoets was out of the office having lunch. Palmer allowed plaintiff to retrieve some things from his desk and took plaintiff's key. (docket # 86, Ex. 45). Palmer contacted Kevin Kemp and advised Kemp that he had terminated plaintiff's employment and that plaintiff was sitting in Ms. Roodvoets's office. Kemp spoke to plaintiff before his departure and indicated that plaintiff could contact Roodvoets regarding any remaining personal items. Kemp advised plaintiff that he had the option of meeting with BEPCO management and that he should contact Diane Roodvoets to make the necessary arrangements. (Palmer Dep. at 47; docket # 86, Ex. 45). Plaintiff testified at his deposition that he had difficulty communicating with Palmer: "I mean, we just couldn't communicate at all. I mean, I don't -- he had a real firey [sic] temper and that just freaks me out. I can't deal with it at all." (Plf. Dep. at 536).

Diane Roodvoets had been away from the office and did not participate in Palmer's decision to terminate plaintiff's

employment. Roodvoets testified at her deposition that in her opinion plaintiff would not have been fired by BEPCO on the basis of his performance reviews alone. (Roodvoets Dep. at 53). Roodvoets testified that she was "extremely disappointed" in the manner Ralph Palmer had terminated plaintiff's employment. She viewed it as unprofessional because it had been based on Palmer's emotion. Roodvoets criticized Ralph Palmer for his lack of "emotional intelligence." (Roodvoets Dep. at 50-51).

Diane Roodvoets testified that BEPCO kept two files for its active employees. Medical records were filed separately from personnel files. It was only after an individual left employment at BEPCO that these two files would be combined to economize on BEPCO's available file space. (Roodvoets Dep. at 88-89).

R. Scheduling a Post-Termination Meeting

On June 11, 2001, plaintiff telephoned Diane Roodvoets and requested a post-termination meeting with BEPCO management. (Plf. Dep. at 537). During this conversation, plaintiff confirmed that Palmer had previously discussed plaintiff's lack of technical ability with plaintiff. During this same conversation, plaintiff indicated that he wanted to return to work at BEPCO, but that he would not feel comfortable returning to work with Ralph Palmer. Diane Roodvoets advised plaintiff that, given that Ralph Palmer was Director of Engineering, if plaintiff returned, he would have to return to work under the supervision of Palmer who supervised all BEPCO's engineering groups. (docket # 86, Murch Dep., Ex. 2, Bates-Stamped Ex. 1540; docket # 82, Ex. B). Plaintiff testified that Roodvoets made a representation to him (not reflected in her contemporaneous notes) to the effect that Ralph Palmer would be present during any meeting with

management, but that Palmer could only listen and would not be allowed to say anything. (Plf. Dep. at 534; docket # 86, Bates-Stamped Ex. 1540).

S. Post-Termination Meeting

On June 12, 2001, company president Andrew Murch met with Palmer. Palmer related to Murch the discussion Palmer had with plaintiff on July 8, 2001, regarding problems with the machine plaintiff had been working on and general problems with the quality of plaintiff's work. Palmer advised Murch that plaintiff refused to accept responsibility for problems on the machine and refused to accept Palmer as his supervisor with authority to conduct BEPCO's business in the engineering area, and that Palmer terminated plaintiff's employment. (Murch Dep. at 22-23). Later on June 12, 2001, plaintiff received a post-termination meeting with Andy Murch, Ralph Palmer and Diane Roodvoets. (Plf. Dep. at 528, 537, 540-41; Murch Dep. at 28). Diane Roodvoets summarized her recollection of the June 12, 2001 meeting in a letter to plaintiff:

> On June 12, 2001, Andy Murch met with you, along with me and Ralph Palmer. During the meeting you acknowledged that Ralph had previously discussed mistakes with you, but you attempted to justify those mistakes, stating that "Something has to give. You can only design a machine perfectly, if you don't care about the calendar." We discussed prior conversations regarding your technical abilities, your lack of drawing skill, your lack of computer knowledge and the problems with the "Milford" job. Andy explained how the status quo is not acceptable in our increasingly competitive environment and the attitude that "mistakes will be made" is not acceptable either.

He, then discussed the responsibilities of a mechanical designer and how your actions/behavior did not meet acceptable performance standards. He went on to say that you seemed unhappy being a production engineer and that you wanted to be in R & D. He said that regardless of the product team you worked on, it would be the same for you and that you would be a production engineer. BEP does not have an R & D function.

Under Company policy, BEP reserves its right to terminate you for unsatisfactory job performance and for unacceptable behavior. In addition, the Company reserves the right to terminate at will. Based on our further review of the situation, we stand behind the decision that has been made to terminate your employment. When you have indicated a willingness to return to work, you do not appear open to improving, since you take the attitude that "mistakes will happen" and that you have no room for improvement technically. Your comments regarding Ralph Palmer, including your distrust of him and you reluctance to work for him, further support our conclusion that your working relationships with the engineering organization have been irreparably damaged.

(docket # 86, Murch Dep. Ex. 2; *see* Bates-Stamped Ex. 1540-42; Plf. Dep. at 533-34). Plaintiff admitted at his deposition that Asperger's Syndrome was never mentioned by name at any time during this post-termination meeting. (Plf. Dep. at 540). There was apparently some discussion about problems with plaintiff's drawings and use of a design software package that was not BEPCO's standard. (docket # 86, Bates-Stamped Ex. 1540). According to plaintiff,

Murch jumped into the conversation and stated something to the effect that plaintiff had no right to use AutoCAD when the rest of engineering would be using Inventor and asked plaintiff "Who do you think you are?" (Complaint, ¶¶ 15, 32). Plaintiff testified as follows during his deposition:

> Q. In the meeting that you had with Murch, Palmer and Roodvoets on June 12, did anybody talk about Asperger's Syndrome?
>
> A. I mentioned it not in a word; but in -- as a disability once.
>
> Q. What did you say?
>
> A. That was the statement that Ralph said that was weird, I thought it was really weird, where he said that when he would talk to me I wouldn't hold eye contact with him; that means I can't be trusted. And when he was talking to me out in the shop, I made funny faces at him and he said that was insubordination in his mind, and that was -- I mean, I just turned to Andy and said, "That's part of my disability. You can't hold that against me." I mean, that's the only time I said anything to do with disability.

(Plf. Dep. at 540-41; *see* Complaint, ¶ 32). Plaintiff did not deny in his deposition (Plf. Dep. at 54041) or his affidavit Palmer's claim that plaintiff had been making faces during his verbal exchange with Ralph Palmer on June 8, 2001. Murch apparently listened as plaintiff and Palmer exchanged statements, plaintiff arguing that he was not technically weak and Palmer explaining his reasons for having criticized plaintiff's drawing skills in blunt terms. After both men had

related the events of June 8, 2001, Murch indicated that this appeared to be a situation where there was a conversation between a manager and an employee and the employee did not appear to be getting the message that the status quo attitude of "mistakes will be made" was not acceptable in the increasingly competitive business environment. BEPCO did not have the R&D function which plaintiff appeared to prefer. Plaintiff related something to the effect that he felt he was "getting boned for everyone else's mistakes." Murch asked if there was anything else plaintiff wished to say and plaintiff said, "no." Plaintiff was not reinstated.

Plaintiff was not replaced following his termination. During the summer and fall of 2001, other BEPCO employees were let go as part of a reduction in force. (Palmer Aff., ¶ 4). Plaintiff received unemployment compensation following his termination. (Plf. Dep. at 21).

T. Administrative Charge

Plaintiff filed his administrative charge of discrimination on September 19, 2001.

Plaintiff claimed discrimination on the basis of disability. Plaintiff alleged as follows:

> I began employment with the above-named employer on May 5, 1997 and was last employed as a Mechanical Project Engineer. I am an individual with a disability. Since June 2000 and most recently in May 2001, I have repeatedly requested a reasonable accommodation due to my disability. A reasonable accommodation was not provided to me. On June 8, 2001, I was discharged for allegedly unacceptable behavior and unsatisfactory job performance.

> I believe that I was denied reasonable accommodation and discharged because of disability in violation of Title I of the Americans with Disabilities Act of 1990, as amended.

(docket # 87, Ex. 2, Charge No. 230A11684). On June 17, 2002, the EEOC issued its right-to-sue letter on plaintiff's charge. (Complaint, Ex. A).

U. Examination by Psychologist Weeks

On February 13 and 22, 2002, more than nine months after BEPCO terminated plaintiff's employment, plaintiff was examined by Psychologist Gailord C. Weeks. Plaintiff had seen this same psychologist for marital counseling in November 2000. (Plf. Dep. at 502). Weeks summarized the purpose of his February 2002 psychological evaluation as an effort to answer the following questions:

1. What would be an appropriate diagnosis?
2. Are there any limitations on Dan's ability to function within work environments?
3. What suggestions would there be regarding treatment plans or interventions?
4. Are there specific recommendations for employment?

Plaintiff related that his education consisted of completing high school and one year of trade school. Upon examination, Weeks observed that plaintiff was oriented to time, place, situation and object. Plaintiff's memory function appeared intact. On page ten of his report, Psychologist Weeks set forth the following comments by plaintiff and stated that they were "typed as written" by plaintiff:

I do not get along well with people because of too many variables(?).

I do get along very well with mechanical design in general and machinery in particular. "Machines always follow rules." If something doesn't work - there is always a logical reason why. It can always be reasoned out & corrected. Only once in my life have I met another engineer who "understood" machinery at the theoretical level that I do. Chuck Cowham Engineering VP @ Burke Porter Co.

Historically, people complain about my designs because of bias towards me. i.e.: they don't understand (or like) me, therefore my machine must be flawed.

Chuck was always able to cut through that "stuff" and get to the point.

I experience machinery and mechanics on a multi-sensory level. If a machine or mechanism doesn't perform, the cure is always obvious to me. I "feel" vibrations (for lack of a better term). I "see" imbalances.

Many times, I make a change to a design so a mgr will approve of a machine. They don't "see" the appropriateness of a design & are biased by their dislike of me in general.

If they "let things ride", the machines always work.

(docket # 86, Weeks Report at 10). Psychologist Weeks indicated that plaintiff's Weschler Adult Intelligence Scale-

Third Edition (WAIS-III) test scores for verbal, performance, and full scale IQ scores fell within the very superior range. Plaintiff's verbal comprehension and perceptual organization indexes were also within the very superior range. *(Id.* at 11-12). Psychologist Weeks found that plaintiff displayed "above average ability in arithmetic when measuring numerical reasoning ability. Yet, he did ma[ke] some careless mistakes in arithmetic and had some difficulty processing problems or questions containing multiple number references." *(Id.* at 12). Weeks indicated that this "appeared to have something to do with short-term memory." *(Id.)*. Plaintiff's digit span subtest score was in the average range. It was a "relative intrapersonal weakness when compared to his other verbal strengths." (*Id.*). Plaintiff's score on the digit symbol-coding subtest was within the average range, but "represented a relative intrapersonal weakness when compared to his other strengths non-verbally." *(Id.)*. On the Weschler Memory Scale-Third Edition (WMS-III) test all of plaintiff's primary index scores were within the average range. *(Id.* at 13). Weeks indicated that he gave plaintiff an optional digit span subtest on the WMS-III and plaintiff's scaled score of 7 was below average. Weeks found that this "suggested difficulty with rote auditory short-term memory sequences." Achievement Test-Second *(Id.* at 13-14; Weeks Dep. at 98). On the Weschler Individual Edition (WIAT-II) plaintiff's reading subtest scores and reading composite score were within the high average range. (Weeks Report at 14). "In the math area, numerical operations were within the Average range, whereas Math Reasoning was just within the Superior range. These scores combined for a Mathematics Composite score in the High Average range." *(Id.)*. In the written language area, plaintiff scored in the very superior range in written expression and received an average score on the spelling subtest. *(Id.)*. Plaintiff received a high average score in the area of listening comprehension and a very superior

oral expression score. His oral language composite score was in the very superior range. Plaintiff's total composite score on the WIAT-II was within the superior range. *(Id.)*. Psychologist Weeks observed that plaintiff's capabilities in more concrete processing through reading, decoding, numerical operations and spelling were within the "average" range. *(Id.)*. Weeks found that these average scores were remarkably lower than plaintiff's scores in math reasoning, written expression and oral expression.

As of February 2002, Psychologist Weeks offered the following diagnosis of plaintiff's condition:

Axis I:	299.80 Asperger's Disorder 300.4 Dysthymic Disorder Rule Out Attention Deficit Hyperactivity Disorder
Axis II:	V71.09 No diagnosis on Axis II
Axis III:	Spina Bifida Occulta
Axis IV:	Socially Isolated/Withdrawn, Unemployed related to discord with co-worker, concerns about finances, pending legal issues regarding occupational situation, overall stress within the immediate family.
Axis V:	GAF = 46 (Current)

(*Id.* at 21).

During his deposition on March 5, 2004, Psychologist Weeks testified that plaintiff did not have a learning disability. (Weeks Dep. at 57-58). Memory deficits are not a diagnostic criteria for Asperger's. *(Id.* at 49). Plaintiff's short-term rote

memorization was a "relative weakness" when compared with other intelligence test scores in the "top half percent of the population." *(Id.* at 50, 98). Plaintiff's long-term memory and other aspects of memory were "at least average or strong." *(Id.* at 56). Weeks testified, "What's going to happen with him is that he's going to have his greatest difficulty, and probably his only real difficulty, in learning new tasks, particularly when those tasks require a series of steps or what we call 'sequence' and particularly when those tasks are somehow more rote or non meaningful." *(Id.* at 56). Weeks indicated that plaintiff could overcome this difficulty through pneumonics or rehearsal. *(Id.)*.

Weeks testified that he was aware that plaintiff did not have an engineering degree. Plaintiff's limited engineering education came primarily through job experience. Weeks stated that he believed that plaintiff was capable of getting an engineering degree or more specific training in engineering. Weeks believed that plaintiff retained the capacity to learn and self-teach. *(Id.* at 105-06). Weeks testified that plaintiff had difficulty in terms of social interaction. The primary focus of counseling had been on plaintiff and his wife Corinne and their family. *(Id.* at 22). Weeks testified that recurring problems in the marriage were plaintiff's "ability to share feelings" and to "tune into [Corinne's] needs in various ways." Plaintiff had difficulty at times managing the kids, particularly Corinne's son. *(Id.* at 25). Weeks testified that Corinne "came from a very conflicted marriage herself . . . and certainly had a lot of needs. . . ." (*Id.* at 77)[11] Weeks testified that, "Blended families have tensions that are unique

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[11] Plaintiff testified at his deposition that Corinne filed for divorce in May or June of 2002 and indicated that the divorce became final in February 2003. (Plf. Dep. at 22).

to blended families." *(Id.* at 26). Plaintiff retained the ability to interact socially. *(Id.* at 24, 76). He did have difficulty maintaining eye contact *(Id.* at 28, 34, 94) and Weeks reported that it was an issue in plaintiff's marriage. Weeks testified, "I do know that eye contact and his ability for eye contact did improve through therapy to the point that within therapy sessions he maintained pretty good eye contact. And if Dan were to come in today, I would expect reasonably good eye contact." *(Id.* at 35). With regard to social interaction at work, Weeks testified that there had not been in-depth discussions about it, but that plaintiffhad generally been positive regarding his interaction with co-workers. *(Id.* at 31). Weeks testified that during plaintiff's period of employment at BEPCO, plaintiff never told Weeks that he needed additional days off work. *(Id.* at 117).

V. Complaint Filed

Plaintiff filed his *pro se* complaint in this court on September 13, 2002. (docket # 1). Plaintiff retained counsel in this matter in August 2003. (docket #'s 41, 43). Plaintiff's attorney found it unnecessary to file any amended complaint, and the original *pro se* complaint drafted by plaintiff remains the foundation of plaintiff's lawsuit.

Discussion

Title I of the ADA provides, in relevant part, that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to. . .discharge of employees. . .and other terms, conditions, and privileges of employment." 42 U.S.C.

§ 12112(a). It is undisputed that BEPCO had a sufficient number of employees to be classified as a covered entity.[12]

A "threshold question" is whether a claimant is disabled within the meaning of the meaning of the ADA. *See Mahon v. Crowell,* 295 F.3d 585, 589 (6th Cir. 2002). It is plaintiff's burden to establish that he was a qualified individual with a disability at the time of the allegedly discriminatory act. *See Kocsis v. Multi-Care Mgmt., Inc.,* 97 F.3d 876, 884 (6th Cir. 1996); *see also Sebest v. Campbell CitySch. Dist. Bd. of Educ.,* No. 02-4012, 2004 WL 784991, at * 4 (6th Cir. Apr. 8, 2004). Under the ADA, the term "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2); *see Toyota Motor Mfg., Kentucky, Inc. v. Williams,* 534 U.S. 184, 193 (2002). Plaintiff's complaint asserted that plaintiff had a "disability" under the subsection A, B and C definitions. Defendant counters that plaintiff did not have a "disability" within the meaning of the ADA at the time any allegedly discriminatory action was taken by defendant.[13]

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[12] Defendant has not disputed that it was an "employer" and that plaintiff was an employee as those terms are defined by the ADA. 42 U.S.C. §§ 12101, 12111(4); *see Clackamas Gastroenterology Assoc., P.C. v. Wells,* 538 U.S. 440 (2003).

[13] Defendant did not seek summary judgment on the basis that plaintiff was not qualified for his position as a mechanical project engineer.

I. Physical or Mental Impairment that Substantially Limits One or More Major Life Activities.

"The [ADA] defin[es] 'disability' 'with respect to an individual,' 42 U.S.C. § 12102(2), and in terms of the impact of an impairment on 'such individual,' § 12102(2)(A)." *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555, 566 (1999); *see also Sutton v. UnitedAir Lines, Inc.,* 527 U.S. 471, 483 (1999) (noting that "whether a person has a disability under the ADA is an individualized inquiry"); *Bragdon v. Abbott,* 524 U.S. 624, 641- 42 (1998); 29 C.F.R. Pt. 1630, App. § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."); *Sebest,* 2004 WL 784991, at * 6 ("'statutory obligation to determine the existence of disabilities on a case-by-case basis.'") (quoting *Kirkingburg,* 527 U.S. at 566). Applying the analytical framework adopted by the Supreme Court in *Bragdon v. Abbott,* the court will (1) consider whether plaintiff's condition constitutes an impairment, (2) identify the major life activity that plaintiff relies upon and determine whether it constitutes a major life activity, and (3) whether the impairment substantially limits the major life activity. 524 U.S. at 630-31.

A. Physical or Mental Impairment

The ADA defines disability as a physical or mental impairment that substantially limits one or more of the major life activities of the individual. 42 U.S.C. § 12102(2)(A). Although plaintiff's complaint asserts that plaintiff had a physical impairment, he has not supported this allegation with evidence. Even if the court were to indulgently treat plaintiff's psychologist's reference to "spina bifida occulta" as some

evidence of a back problem, there is no evidence that this physical impairment substantially limited a major life activity.

Plaintiff claims that he was an individual with a disability on the basis of three mental impairments: "dysthymia, Asperger's Syndrome, and a Learning Disorder in the Area of 'working memory.'" (Complaint, ¶ 4). A mental impairment is defined as "any mental or physical disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2). Although there is little case law directly on point, Asperger's Syndrome would be considered a "mental impairment." *See Connolly v. Entex Info. Serv., Inc.*, No. 00-35534, 2001 WL 1609756 (9th Cir. Dec. 13, 2001) (providing no analysis of whether the plaintiff's Asperger's Syndrome constituted a disability as defined by the ADA, but finding that Entex was entitled to judgment in its favor as a matter of law on plaintiff's claims that Entex failed to make a good faith effort to provide reasonable accommodation); *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1422 (11th Cir. 1998) (Food World did not contest that the plaintiff's Asperger's Syndrome was a mental impairment as defined by the ADA). Likewise, dysthymia is generallyrecognized as a mental impairment. *See, e.g., Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1 st Cir. 1997).

Plaintiff asserts that on and before June 8, 2001, he had Asperger's Syndrome and dysthymia. Plaintiff relies on the February 2002 report of Psychologist Weeks and the May 8, 2000 report by Psychologist Zwart as evidence demonstrating that he had these mental impairments on and before June 8, 2001. Following a brief, one-hour interview on May 8, 2000, Psychologist Zwart offered his "diagnostic impression" that plaintiff had Asperger's Syndrome and dysthymia. Zwart had

previously stated in September 1999 that plaintiff met the diagnostic criteria for a dysthymic disorder. Although Zwart's "diagnostic impressions" based upon his relatively brief encounters with plaintiff, primarily recording plaintiff's subjective complaints, are not particularly strong evidence that plaintiff actually had Asperger's Syndrome or dysthymia on and before June 8, 2001, it is nonetheless evidence upon which a reasonable trier of fact could base such a finding. The February 2002 psychological evaluation by PsYchologist Weeks never purported to assess plaintiff's condition at any time prior to February 2002. Nonetheless, construing all reasonable inferences in plaintiff's favor, Weeks's report combined with Zwart's opinion could lead a reasonable trier of fact to find that plaintiff had Asperger's Syndrome and/or dysthymia on and before defendant terminated his employment on June 8, 2001.

Plaintiff's claim that he had a "Learning Disorder in the area of working memory" (Complaint, ¶ 4) is unsupported. Plaintiff's brief makes no effort to support this allegation with evidence. Psychologist Zwart's September 1999 and May 8, 2000 reports did not include any diagnosis of a learning disorder. Plaintiff's digit-span test results in February 2002 fell within the "average" range. All plaintiff' s primary index scores on the Weschler Memory Scale - Third Edition (WMS-III) fell within the average range. Although plaintiff's scores in these areas were lower than plaintiff's exceptionally high scores in other areas, such scores do not support plaintiff's claim of a learning disability. Psychologist Weeks testified that although plaintiff had a relative weakness in the area of short-term rote memorization when it was compared to his exceptionally high scores in other areas tested, plaintiff did not have a learning disability. (Weeks Dep. at 57-58). Plaintiff has not cited, nor has the court been able to locate, any authority establishing that "average" scores constitute a

learning impairment, much less a learning impairment that would rise to the level of an impairment substantially limiting a major life activity.

Plaintiff's brief makes repeated references to plaintiff's claims that he found it difficult to learn various software programs. (Plf. Brief at 4, 6, 8, 12, 13). Plaintiff's statements do not establish any learning impairment. Plaintiff testified that, although it took some time for him to learn to use the AutoCAD computer program, after he did learn it, plaintiff could draw "automatically." (Plf. Dep. at 143-44). With regard to the other software programs, plaintiff's efforts as far as completing and attempting to apply new software programs were inconsistent. Plaintiff sought to "ride it out" on the old software programs he knew how to operate. Psychologist Weeks testified that plaintiff was capable of overcoming any difficulties in this regard through pneumonics or rehearsal. (Weeks Dep at 56). Plaintiff has not submitted sufficient evidence upon which a reasonable trier of fact could find that plaintiff had any learning impairment, much less one that rose to the level of limitation necessary to satisfy the ADA's demanding standard for disability. *See, e.g., Ristrom v. Asbestos Workers Local 34 Joint Apprentice Comm.*, 370 F.3d 763 (8th Cir. 2004) (Plaintiff's conclusory pronouncements that he is substantially limited in the major life activity of learning because he found certain subjects or educational contexts challenging or frustrating was "insufficient to withstand summary judgment."); *Summers v. Middleton & Reutlinger, P.S.C.*, 214 F. Supp. 2d 751,756 (W.D. Ky. 2002) (holding that the plaintiff's "alleged difficulty with learning defendant's computer system" did not show that she was substantially limited in the major life activity of learning); *accord Li v. Intel Corp.*, No. 00-17507, 2002 WL 1060309, at * 1 (9th Cir. May 28, 2002) (affirming district court's grant of summary judgment in favor of employer because the

plaintiff's mere inability to meet turnaround times and quickly grasp material unique to microchip circuit design at Intel did not demonstrate that she was substantially limited in learning).

The Seventh Circuit's decision in *Leisen v. City of Shelbyville,* 153 F.3d 805 (7th Cir. 1998), is particularly instructive. Leisen, an individual with alleged emotional disabilities, was unable to pass courses necessary to gain a required paramedic license during her three-year probationary term and claimed her termination was in violation of the ADA. The Seventh Circuit held that plaintiff had not demonstrated that her emotional impairments or depression substantially limited the major life activity of learning. In reaching this conclusion, the Seventh Circuit made this observation:

> The mere fact that Leisen was having obvious difficulty in passing the course for paramedic certification does not show that she was substantially limited in the major life activity of leaming, any more than the fact that a particular individual might not be able to pass a course in physics or philosophy would allow an inference that all learning activity was substantially limited.

153 F.3d at 808.

It is well established that a mere diagnosis of a condition is insufficient to establish a disability within the meaning of the ADA. Individuals attempting to prove disability status under this test do not meet their burden by merely submitting evidence of a medical diagnosis of an impairment. *Toyota,* 534 U.S. at 198. Disability is not based upon a diagnosis, but on the effect of that impairment on the life of the individual. *See Albertson's, Inc. v. Kirkingburg,* 527 U.S. at 566.

B. Substantially Limits a Major Life Activity

"' Substantially limits' and 'major life activities are terms of art under the [ADA]." *Mahon v. Crowell,* 295 F.3d at 590. The Supreme Court determined that "these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled. . . ." in order to remain consistent with congressional findings and purposes that motivate the ADA. *Toyota,* 534 U.S. at 197. "If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher" than Congress had identified. *Id.*

1. Major Life Activity

"Major life activities" are "activities that are of central importance to daily life." *Toyota,* 534 U.S. at 197. The Sixth Circuit has observed that "there is no exhaustive list of major life activities." The Court of Appeals has also noted that the Supreme Court's *Toyota* decision cited with approval regulations defining major life activities. *Mahon,* 295 F.3d at 590. These regulations define major life activities as including caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(i). Plaintiff claims that his mental impairments substantially limit four major life activities: (1) plaintiff's ability to remain married; (2) plaintiff's ability to get along with co-workers; (3) plaintiff's ability to hold a job; and (4) plaintiff's ability to sleep. (Plf. Brief at 14).[14]

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[14] The court's analysis is restricted to only those "major life activities which the plaintiff asserts are limited by the claimed impairment." *Heisler v. Metro. Council,* 339 F.3d 622, 627 (8th

a. Ability to remain married

Plaintiff asserts that his "ability to remain married" is a major life activity.[15] Plaintiff has not cited, and the court has been unable to locate, any case where a court has found that marriage or the ability to remain married constituted a "major life activity" as that term of art is defined in the ADA.[16] In *Bragdon v. Abbott,* 524 U.S. 624, 638 (1998), the Supreme Court recognized "reproduction" as a major life activity.

Cir. 2003). "[B]ald assertions that one is limited in a major life activity are insufficient to withstand summary judgment." *Id.* at 628.

[15] Plaintiff's brief offers nothing but bare conclusions: "We could go back and forth on this issue. Defendant points to Plaintiff's ability to get married, but Plaintiff's ability to stay married is a substantial limitation." (Plaintiff's Brief at 14).

[16] In *Treiber v. Lindbergh Sch. Dist.,* 199 F. Supp. 2d 949, 960 (E.D. Mo. 2002), the plaintiff's assertion that cancer limited her major life activities of ability to marry and have children was undermined by her own testimony that her not marrying or having children had been career choices. The only other case the court has been able to locate is a 1997 opinion from the Western District of Pennsylvania. *See Scherback v. Wright Automotive Group,* 987 F. Supp. 433, 438 (W.D. Pa. 1997) ("marriage" listed as a major life activity without any analysis). *Sherback's* fou[illegible]nal premise that mental impairments must be assessed without [illegible]gating measures such as medications was expressly overruled by the Supreme Court in 1999. *See Sutton,* 527 U.S. at 482-83, and *Murphy v. United Parcel Serv., Inc.,* 527 U.S. 516 (1999). Likewise, the *Sherback* decision was issued without the benefit of the Supreme Court's subsequent decisions in *Toyota,* 534 U.S. at 198, *Kirkingburg,* 527 U.S. at 566, and *Bragdon,* 524 U.S. at 630-31, which establish the analytical framework this court must apply.

> "The plain meaning of the word 'major' denotes comparative importance" and "suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." 107 F.3d at 939, 940. Reproduction falls well within the phrase "major life activity." Reproduction and the sexual dynamics surrounding it are central to the life process itself.

Bragdon, 524 U.S. at 638. Reproduction is a biologically necessary activity. *Id.*

Although marriage and divorce are legally recognized acts,[17] marriage is not an "activity" similar to the activities walking, learning, or even reproduction. The court certainly agrees that an individual's relationship with one's spouse should be of "central importance to daily life," but divorce statistics do more than suggest that it often it is not. Acceptance of an individual's ability to "remain married" as a major life activity creates a host of subsidiary problems for any court attempting to apply the "substantially limits" aspect of the ADA standard. For example, if personality conflicts were considered sufficient to establish a substantial limitation on the ability to remain married, the federal courts would be hard pressed to find any divorced individuals who would not

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[17] There is an ongoing legal and cultural debate in the United States concerning the ability of states to define and legally recognize "marriages" between same-sex couples. It is only mentioned herein for purposes of providing an example of the difficulty of defining the profound concept of marriage and all its religious, legal, societal, family, interpersonal and individual meanings. To put it mildly, the court finds "marriage" or "the ability to remain married" as being ill-suited to assessment under the ADA's "substantially limits" standard.

be disabled under a broad application of the standard. *See Toyota,* 534 U.S. at 197. For that matter, would individuals who had never married, either because they were frightened of the prospect of marriage or because they had not yet met the right person, likewise be considered "substantially limited" in the major life activity becoming married? Would couples and engaged in marital counseling and experiencing difficulties be considered "substantially limited" in their ability to remain married? If one spouse displayed repeated marital infidelity, would the faithful spouse be "substantially limited" in the ability to remain married? The unmanageable nature of plaintiff's proffered standard, the extraordinary number of individuals who would be considered disabled under it, and a common-sense application of the term "activity" all lead the court to conclude that the "ability to remain married" is not a "major life activity" within the meaning of the ADA.

b. Sleeping

Plaintiff also proffers sleeping as a major life activity. The Sixth Circuit has recognized sleeping as a major life activity. *See Boerst v. General Mills Operations, Inc.,* No. 003281, 2002 WL 59637, at * 3 (6th Cir. Jan. 15, 2002) *(citing Pack v. Kmart Corp.,* 166 F.3d 1300, 1305 (10th Cir. 1999)); *see also Cartwright v. Lockheed Martin Util. Servs., Inc.,* No. 00-6671,2002 WL 1461753, at * 4 (6th Cir. July 3, 2002) (collecting cases). Plaintiff's brief presents the following argument, based on excerpts appearing on pages 495 and 496 of his deposition:

> [W]e can simplify the debate by noting that sleep is also a major life activity and that there is evidence that activity was substantially limited:

> Q . . .Were you having problems sleeping while you were employed at Porter?
>
> A Yes. Probably happened once or twice a month, starting probably second half of'98 (495). . . it gradually got worse until probably spring of '01 when I had to start dealing with Ralph, then it got to be quite a bit worse... sometimes three or four days a week I'd maybe get an hour or two of sleep a night.[18]

(Plf. Brief at 14) (citation omitted). Immediately thereafter, footnote 5 on pages 14 and 15 of plaintiff's brief states, "Plaintiff does not concede the validity nor controlling effect of the statement in *Toyota Motor*... that the impairment's impact must also be permanent or long term.'" Plaintiff argues that the Supreme Court's statement in *Toyota* was "dictum." (Plf. Brief at 15 n.5). The United States Court of Appeals for the Sixth Circuit has repeatedlyrejected plaintiff's argument that the impairments' impact need not be permanent or long term. This court is bound to follow controlling Sixth Circuit precedent. Short-term, temporary restrictions on major life activities are generally not disabilities under the ADA. *See Hein v. AllAm. Plywood Co.*, 232 F.3d 482,487 (6th Cir. 2000); *Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996); *accordAmann v. Potter*, No. 03-3455, 2004 WL 1759150, at * 4 (6th Cir. Aug. 3, 2004) ("[T]he impact of the impairment must be permanent or long-term.") (citing

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[18] "[A] single conclusory statement about an alleged substantial limitation is not enough to avoid summary judgment sought by the employer." *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593, 598 (6th Cir. 2002).

Toyota, 534 U.S. at 198); *Rohan v. Networks Presentations LLC,* 375 F.3d 266, 274 (4th Cir. 2004) ("An impairment's impact on a major life activity must be 'permanent or long term.'") (quoting *Toyota,* 534 U.S. at 198). Plaintiff has not presented evidence from which a reasonable trier of fact could find that his major life activity of sleep had been substantially limited during the relevant time frame and that such limitation was caused by plaintiff's mental impairments.

c. Work

Finally, plaintiff points to "work" as being the major life activity which was substantially limited by his impairments. The Supreme Court has assumed without deciding that work is a major life activity, but has recognized that there is "some conceptual difficulty in defining 'major life activities' to include work." *Sutton v. United Airlines, Inc.,* 527 U.S. at 492.

> We note. . .that there may be some conceptual difficulty in defining "major life activities" to include work, for it seems to argue in a circle to say that if one is excluded, for instance, by reasons of [an impairment, from working with others]. . .then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of a handicap.

527 U.S. at 492 (citation omitted); *see Gonzlaes v. National Bd of Med. Examiners,* 225 F.3d 620, 630 (6th Cir. 2000). "The EEOC has itself suggested that working be viewed as a residual life activity, considered only as a last resort '[i]f an individual is not substantially limited with respect to any other major life activity.' 29 C.F.R. § pt. 1630, App. § 1630.2(j)." *Gelabert-LadenHeim v. American Airlines, Inc.,* 252 F.3d 54,

58 (1st Cir. 2001). "When the major life activity of working is at issue (as opposed to any other major life activity), the plaintiff assumes a more fact-specific burden of proof." 252 F.3d at 58.

"When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." *Sutton,* 527 U.S. at 491. The plaintiff must demonstrate that he is precluded from more than a particular job. *See Murphy v. United Parcel Serv., Inc.* 527 U.S. 516, 525 (1999); *Santiago Clemente v. Executive Airlines, Inc.,* 213 F.3d 25 (1st Cir. 2000). In order to survive defendants' motion for summary judgment, plaintiff was required to show that he was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3); *see Huge v. General Motors Corp.,* No. 01-4057, 2003 WL 1795691, at * 2 (6th Cir. Mar. 26, 2003); *Whitson v. Union Boiler Co.,* No. 01-5294, 2002 WL 31205208, at * 2 (6th Cir. Oct. 2, 2002). Plaintiff did not submit any evidence showing that his Asperger's Syndrome, dysthymia, or his purported learning impairment restricted his ability to perform either an entire class of jobs or a broad range of jobs in various classes. *See Lane v. Bell County Bd. of Educ.,* No. 02-5345, 2003 WL 21949188, at * 5 (6th Cir. Aug. 12, 2003); *Blue v. Federal Express Corp.,* No. 02-6262, 2003 WL 21054657, at * 1 (6th Cir. May 5, 2003). "The major life activity of working is not 'substantially limited' if a plaintiff cannot work under a certain supervisor because of anxiety and stress related to his review of [the employee's] job performance." *Weiler v. Household Fin. Corp.,* 101 F.3d

519, 524 (7th Cir. 1996); *see also Bragg v. Potter*, Nos. 03-1729, 03-1730, 2004 WL 260043, at * 3 (7th Cir. Feb. 9, 2004).

Plaintiff relies on two limited aspects of the ability to perform work:[19] (1) the ability to get along with co-workers; and (2) the ability to "maintain employment." In *Toyota*, the Supreme Court held that a substantial limitation must apply to "the variety of tasks central to most people's daily lives," not merely to a sub-class of that activity. 534 U.S. at 200; *see Deprisco v. Delta Air Lines, Inc.*, No. 02-5833, 2004 WL 93943, at * 4 (6th Cir. Jan. 16, 2004).

There is a split of authority among the federal courts of appeals with regard to whether the ability to get along with co-workers constitutes a major life activity within the meaning of the ADA. The First Circuit has held that the ability to get along with co-workers is not a major life activity within the meaning of the ADA. *See Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997). In *Soileau*, the plaintiff argued that his dysthymia substantially limited his major life activity of getting along with his co-workers. The First Circuit held that the "ability to get along with others" was so elastic that it failed to provide a workable definition.

> The concept of "ability to get along with others" is remarkably elastic, perhaps so much so as to make it unworkable as a definition. While such an ability is to

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[19] Attempts to carve out limited aspects of working in support of an ADA claim are not uncommon. *See, e.g., Sinkler v. Midwest Prop. Mgmt. Ltd. P'ship*, 209 F.3d 678, 685 (7th Cir. 2000). For example, commuting is not a major life activity. "Getting to and from work assignments is not a major life activity. Rather, this task is either a sub-species of the activity of 'working' or 'driving.'" *Id.*

> be prized, it is different in kind from breathing or walking, two exemplars which are used in the regulations. Further, whether a person has such ability may be a matter of subjective judgment; and the ability may or may not exist depending on context. Here, Soileau's alleged inability to interact with others was triggered by the vicissitudes of life which are normally stressful for ordinary people – losing a girlfriend or being criticized by a supervisor. . . . To impose legally enforceable duties on an employer based on such an amorphous concept would be problematic.

Soileau, 105 F.3d at 1234. The Fourth Circuit recently expressed significant doubt as to whether interacting with others constituted a major life activity within the meaning of the ADA, but found it unnecessary to resolve the issue because the plaintiff had not demonstrated that it was an activity in which she was substantially limited. *Rohan v. Networks Presentations LLC,* 375 F.3d 266 (4th Cir 2004). The Ninth Circuit now stands alone as the only federal appellate court to accept interacting with others as a major life activity under the ADA. *See McAlindin v. County of San Diego,* 192 F.3d 1226, 1234 (9th Cir. 1999) ("Because interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity.'").[20]

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[20] Plaintiff's counsel's decision to selectively cite only the Ninth Circuit's *McAlindin* decision and ignore the First Circuit' s *Soileau* decision does not inspire confidence. The Ninth Circuit stated that its rigorous application of the substantial limitation requirement would narrow the number of disabled individuals. "Recognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed

Upon review of the *Soileau, Rohan* and *McAlindin* decisions, the court finds that the First Circuit's decision in *Soileau* is more persuasive and that it is likely to be followed by the United States Court of Appeals for the Sixth Circuit. Plaintiff's purported inability to get along with co-workers is not a "major life activity" within the meaning of the ADA.

Plaintiff also proffers a claimed inability to "maintain employment" as a major life activity. Plaintiff cites no legal authority in support of this proposition. As plaintiff's own deposition testimony aptly demonstrates, individuals elect to change employers for ahost of reasons. The problem of definition circularity noted by the Supreme Court in *Toyota* is even more patent if the ability to "maintain" employment is recognized as a major life activity within the meaning of the ADA. The court finds plaintiff's proffered standard is unworkable and unsupported by any legal authority.

2. Substantially Limited

To fall within the ADA definition, the impairment must "substantially limit" a major life activity.[21] Even if the court were to accept one or more of plaintiff's proffered major life activities (abilityto remain married, sleeping, and the two subsets of working, the ability to get along with co-workers, and the ability to maintain employment), plaintiffhas not

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substantially limited in a major life activity. Mere trouble getting along with co-workers is not sufficient to show a substantial limitation." 192 F.3d at 1235.

[21] The EEOC has codified regulations interpreting the term "substantially limits" in this manner, defining the term to mean "[u]nable to perform" or "[s]ignificantly restricted." See 29 C.F.R. §§ 1630.20)(1)(i),(ii).

submitted evidenceupon which a reasonable trier of fact could find that his impairments ofdysthymia, Asperger's Syndrome, or learning impairment substantially limited[22] these major life activities. In its decision in *Toyota,* the Supreme Court adopted a stringent standard for the term of art "substantially limits":

> "[S]ubstantially in the phrase "substantially limits" suggests "considerable" or" to a large degree." See Webster's Third New International Dictionary 2280 (1976) (defining "substantially" as "in a substantial manner'' and "substantial" as "considerable in amount, value, or worth" and "being that specified to a large degree or in the main"); see also 17 Oxford English Dictionary 66-67 (2d ed. 1989) ("substantial": "[r]elating to or proceeding from the essence of a thing; essential"; "of ample or considerable amount, quantity or dimensions").

534 U.S. at 196.

As previously noted, a mere diagnosis of having a mental impairment does not establish a disability. *See e.g., Ristrom v. Asbestos Workers Local 34 Joint Apprentice Comm.,* 370 F.3d 763, 769 (8th Cir. 2004) (depression and ADD not "disabilities per se" under the ADA). The plaintiff must "satisfy the ADA's demanding standard in each individual

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[22] "A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity." *Sutton,* 527 U.S. at 482-83.

case in the context of the major life activity asserted. *Id.* "[A]ny impairment that only moderately or intermittently prevents an individual from performing major life activities is not a substantial limitation under the Act." *Mahon v. Crowell*, 295 F.3d at 590-91.

> A person is "substantially limited" in a major life activity if he is:[23]
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). The following factors are relevant in determining whether an individual is substantially limited in a major life activity:

> (1) The nature and severity of the impairment;
> (2) The duration or expected duration of the impairment; and

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[23] An employer "is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job." *Sutton*, 527 U.S. at 490; *see Rohan*, 375 F.3d at 278.

(3) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2); *See Black v. Roadway Express, Inc.*, 297 F.3d 445, 449 n.4 (6th Cir. 2002); *see also Sebest v. Campbell City Sch. Dist. Bd. of Educ.*, 2004 WL 784991, at * 4; *Deprisco v. Delta AirLines, Inc.*, 2004 WL 93943, at * 3.

With regard to the duration of plaintiff's impairment, the court will assume for summary judgment purposes that plaintiff's dysthymia, Asperger's Syndrome, and claimed learning impairment are lifelong conditions. *See Soileau* 105 F.3d at 16 (dysthymia). Plaintiff, however, has not presented evidence of the permanent or long-term impact of these impairments.[24]

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[24] At oral argument, plaintiff made some mention that he had some sort of significant deterioration in his condition after June 8, 2001. Plaintiff states that he applied for, was awarded, and apparently continues to receive, social security disability benefits. It is unclear whether the disability upon which social security benefits were awarded has any relationship to the alleged disabilities at issue herein. In the absence of any demand by plaintiff for reinstatement or argument by defendant that plaintiff was not qualified to be a mechanical project engineer, plaintiff's subsequent receipt of social security disability benefits is of dubious relevance to any issue in this lawsuit, with the possible exception of limiting plaintiff's damages in the event that plaintiff's ADA claims survive defendant's motion for summary judgment. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806-07 (1999) (where the plaintiff asserted she was able to perform the essential functions of her job following her stroke, yet had also filed a sworn assertion in an application for social security benefit stating that she was totally disabled, the plaintiff's response to the defendant's motion for

The key factor in determining whether plaintiff's impairments substantially limit a major life activity is the nature and severity of plaintiff's impairments. Plaintiff has not presented evidence establishing that plaintiff's ability to remain married has been "substantially limited" by Asperger's Syndrome, dysthymia, or a learning impairment. Plaintiff testified during his deposition that his first wife's repeated infidelity was a primary reason he divorced his first wife. Plaintiff did not attribute the end of his brief second marriage to his mental impairments. Plaintiff testified that his second wife physically assaulted him when he tried to leave her. There is no evidence of any cause-and-effect relationship between plaintiff's dysthymia, Asperger's Syndrome, or learning impairment and plaintiff's divorces. Plaintiff remained married to Corinne, his third wife, during the entire period of his employment at BEPCO. The fact that plaintiff subsequently elected to divorce his third wife is not relevant to the issue of whether plaintiffwas substantially limited in his major life activity of "remaining married" on and before June 8,2001, when BEPCO terminated his employment.

Plaintiff has not presented any evidence that Asperger's Syndrome, dysthymia, or a learning impairment substantially limited his ability to sleep. As previously noted, short-term, temporary restrictions on major life activities are generally not disabilities under the ADA. *See Hein,* 232 F.3d at 487; *Roush,* 96 F.3d at 843. Plaintiff has not presented any

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summary judgment could not "simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim," but the plaintiff was required to proffer a "sufficient explanation."). Here, the court need not analyze the matter further because plaintiff and defendant elected not to include any records of social security proceedings as evidence either in support of or in opposition to defendant's motion for summary judgment.

evidence establishing that this is the extraordinary case where a temporary, short term impact on plaintiff's ability to sleep would "substantially limit" the major life activity of sleep. "Getting between two and four hours of sleep a night, while inconvenient, simply lacks the kind of severity we require of an ailment before we will say that the ailment qualifies as a substantial limitation under the ADA." *Boerst,* 2002 WL 59637, at * 4; *see Heisler v. Metro. Council,* 339 F.3d 622, 628 (8th Cir. 2003) (Plaintiff "simply failed to establish that her depression, or any other impairment, significantly restricted her ability to sleep as compared to the general population."); *see also Lorinz v. Turner Const. Co.,* No. 00-CV-612355, __ F. Supp. 2d __, 2004 WL 1196699, at * 3 (E.D.N.Y. May 25, 2004). Plaintiff has not presented a triable issue of fact as to whether his sleep disruption was sufficiently severe, long term, or of permanent impact to substantially limit his ability to sleep. *See McCrary v. Aurora Pub. Sch.,* No. 02-1098, 2003 WL 191433, at * 7 (6th Cir. Jan. 29, 2003); 29 C.F.R. § 1630.2(j)(2).

Plaintiff claims that he was "substantially limited" in his major life activity of working. As noted in the preceding section, to satisfy the applicable standard, the plaintiff must do much more than show that his impairments prevented him from performing "more than one type of job, a specialized job, or a particular job of choice." *Mahon v. Crowell,* 295 F.3d at 591.

> When the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. Reflecting this requirement, the EEOC uses a specialized definition of the term "substantially limits" when referring to the major life activity of working:

> "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." [29 C.F.R.] § 1630.2(j)(3)(i)."

Sutton, 527 U.S. at 491-92; *see Sinkler,* 209 F.3d at 685 (Plaintiff "has the burden of presenting evidence to identify how [his] impairment limited an entire class or broad range of jobs.").

In *Mahon,* the Sixth Circuit described the plaintiff's burden in these terms:

> To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs. *Sutton,* 527 U.S. at 492, 119 S. Ct. 2139.
>
> To determine if the claimant is precluded from a substantial class or a broad range of jobs, we compare his access to jobs to the access available to a non-injured individual with similar training and experience, looking specifically to the labor market in the claimant' s geographic vicinity. *See id.* at 491-92, 119 S. Ct. 2139; *Burns v. Coca-Cola Enterprises, Inc.,* 222 F.3d 247, 253-54 (6th Cir. 2000).

Mahon, 295 F.3d at 591. The Sixth Circuit has indicated that courts should consider the following factors, in addition to the three previously listed, in the process of determining whether an individual is substantially limited in the major life activity of working:

> (A) The geographical area to which the individual has reasonable access;
> (B) The job from which the individual has been disqualified because of an impairment, and the number and type of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, for which the individual is disqualified because of the impairment (class of jobs); and/or
> (C) The job from which the individual has ben disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Black v. Roadway Express, 297 F.3d at 449 n.7 (quoting 29 C.F.R. § 1630(j)(3)(ii)). Plaintiff did not submit any evidence that his mobility was limited to a narrow geographical area. Plaintiff was required to prove that he was disabled at the time of the allegedly discriminatory act. *Kocsis,* 97 F.3d at 884. Plaintiff has not presented evidence that he was precluded from a substantial class or broad range of jobs.

With regard to the nature and severity of plaintiff's impairments, the evidence does not establish that plaintiff had

particularly severe problems interacting with others,[25] with the exception of his supervisor Ralph Palmer. This does not establish a substantial limitation. *Soileau,* 105 F.3d at 15. For example, in *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1255 (10th Cir. 2001), the plaintiff complained that he had "severe interpersonal problems" with "many of his co-workers," and that his obsessive compulsive disorder and depression "included behaviors that made him the frequent butt of nasty comments or jokes." 241 F.3d at 1255. The Tenth Circuit found that plaintiff failed to provide evidence establishing that he had trouble getting along with people in general. "Instead, Mr. Steele's difficulties seem to have been limited to a few people he worked with. Like the plaintiff in *Soileau,* 'the evidence does not establish that [he] had particular difficulty interacting with others, except for [certain co-workers].'" 241 F.3d at 1255 (quoting *Soileau,* 105 F.3d at 15).

Plaintiff has not established the presence of a "substantial limitation" in this regard for the reasons identified by the First, Ninth and Tenth Circuits in *Soileau, McAlindin,* and *Steele.* "Mere trouble getting along with co-workers is not sufficient to show a substantial limitation." *McAlindin,* 192 F.3d at 1235. Evidence that the plaintiff had difficulty interacting with particular supervisors or co-workers does not suffice. *See Steele v. Thiokol Corp.*, 241 F.3d at 1255; *Soileau,* 105 F.3d at 15. "[I]n order to demonstrate a plaintiff's major life activity of interacting with others was substantially affected, a plaintiffmust show that his relations with others are characterized on a regular basis by severe

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[25] The difficulty interacting must be caused by the impairment and not other causes. *See Rohan,* 375 F.3d at 275. (difficulty interacting with family members was a result of their disbelief in plaintiff's allegation that her father had sexually abused her as a child, not the result of her mental impairments).

problem, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary." *Steele v. Thiokol Corp.*, 241 F.3d t248, 1255 (10th Cir. 2001); *see Doebele v. Sprint/UnitedMgmt. Co.*, 342 F.3d 1117, 1131 (10th Cir. 2003). The evidence plaintiff submitted in support of his claim does not approach satisfying this demanding standard." *See Carruthers v. BSA Adver., Inc.*, 357 F.3d 1213, 1216 (11th Cir. 2004).

II. Record of Impairment

Plaintiff's complaint contains an allegation that plaintiff had been discriminated against by defendant in violation of the ADA because plaintiff had a "record of disability." (Complaint p.2, ¶ 1). Plaintiff's brief in opposition to defendant's motion for summary judgment does not make any effort to support this claim with evidence. Upon review, the court finds that plaintiff has not presented evidence upon which plaintiffcould be found disabled within the meaning of 42 U.S.C. § 12102(2)(B).

The ADA's definition of"disability" may be satisfied if the plaintiff has "a record" of an impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2)(B). "The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability." 29 C.F.R. Part 1630, App. § 1630.2(k). "A record of impairment means an individual has 'a history of, or has been miscalculated as having, a mental or physical impairment that substantially limits one or more major life activities.'" *MXGroup, Inc. v. City of Covington,* 293 F.3d 326, 339 (6th Cir. 2002)(quoting 28 C.F.R. § 35.104(3)). "In order to have a record of disability, an employee's documentation must show that []he has a history of or has been subject to misclassification as

disabled." *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 961 (8th Cir. 2000). "Regardless of whether [the plaintiff] is proceeding under a classification or misclassification theory, the record-of-impairment standard is satisfied only if []he actually suffered a physical impairment that limited one or more of [his] major life activities. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities." *Hilburn v. Murata Elec. N. Am., Inc.*, 181 F.3d 1220 (11th Cir. 1999). The absence of any of these elements is fatal to a claim of disability based upon 42 U.S.C. § 12102(2)(B). *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 645-46 (2d Cir. 1998) (hospitalization for 30 days following cerebral hemorrhage was a record of an impairment, and the hemorrhage itself was an impairment, but the plaintiff did not have a record of impairment as defined by § 12102(2)(B) because the plaintiff failed to show that the impairment for which he was hospitalized imposed a substantial limitation on one or more of his major life activities); *Horwitz v. L & J. G. Stickley, Inc.*, 122 F. Supp. 2d 350, 357 (N.D.N.Y. 2000) (record of a brief hospitalization for bi-polar disorder and six weeks of treatment at a psychiatric care center were "insufficient to constitute a record of disability that substantially limited plaintiff's ability to engage in one or more of her major life activities.").

"[I]t is not enough for an ADA plaintiff to simply show that he has a record of a [] diagnosis; in order to establish the existence of a 'disability' under § 12102(B), there must be a record of an impairment that substantially limits one or more of the ADA plaintiff's major life activities." *EEOC v. R.J. Gallagher CO.*, 181 F.3d 645, 655 (5th Cir. 1999). Simply being hospitalized does not establish a record of impairment within the ADA's definition. *See Gutridge v. Clure*, 153 F.3d 898,901-02 (8th Cir. 1998); *see also Heisler*, 339 F.3d at 630

(being hospitalized on four occasions for short periods, taking medications, and receiving shock therapy treatments for depression did not establish a record of an impairment substantially limiting one or more major life activities); *Sorensen v. University of Utah Hosp.*, 194 F.3d 1084 (10th Cir. 1999) (five-day hospitalization and recovery time on the basis of MS symptoms did not establish an impairment that substantially limited a major life activity); *Loberg v. Gordon Flesch Co.*, 308 F. Supp. 2d 890, 891 (N.D. Ill. 2004) (mere diagnosis of Reynaud's phenomenon, brief hospitalization, two letters from a doctor indicating that plaintiff needed to avoid nicks and cuts did not establish a record of impairment under § 12102(2)(B)). A record indicating that plaintiff had been found disabled for other purposes under other standards is insufficient. *See Colwell*, 158 F.3d at 645; *Curry v. HON Co.*, No. Civ. 4:02-CV-10233, 2004 WL 691245, at * 6 (S.D. Iowa Feb. 26, 2004) (employer's knowledge of back injury and placement of plaintiff on short-term disability failed to establish a record of disability within the meaning of the ADA). Plaintiff was never hospitalized for any mental impairment during the relevant time frame. Plaintiff has not presented evidence of a record of an impairment "substantially limiting" a "maj or life activity" for the reasons previously set forth in this opinion. Plaintiff has not asserted or supported with evidence any assertion that BEPCO "misclassified"[26] him as having an impairment that

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[26] "Record of impairment claims under 42 U.S.C. § 12102(2)(B) seem to be little used and even less discussed aspect of ADA jurisprudence." *Edwards v. Ford Motor Co.*, 218 F. Supp. 2d 846, 851 (W.D. Ky. 2002). This is particularly true when it comes to misclassification claims under section 12102(2)(B) which are more often addressed as "regarded as" claims under 42 U.S.C. § 12102(2)(C). *See Thompson v. Eaton Co.*, No. 02-C-051-C, 2002 WL 31995670, at * 6 (W.D. Wisc. Dec. 24, 2002) (Observing that,

substantially limits a major life activity. Defendant is entitled to judgment as a matter of law on this claim.

III. Regarded as Having Impairments

Plaintiff argues that even if he was not actually disabled, defendant should nonetheless be found in violation of the ADA because defendant regarded plaintiffas disabled under 42 U.S.C. § 12102(2)(C). (Plf. Brief at 15). Subsection (C) provides that having a disability includes "being regarded as having," a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(C). There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical [or mental] impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.[27] In both cases, it is necessarythat a covered entity

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"It is not clear what the difference is between being 'misclassified' as disabled [under § 12102(2)(B)] and being 'regarded' as disabled under § 12102(2)(C)," but finding it unnecessary to resolve the issue because the plaintiff, as here, did not assert that he had been misclassified by his employer).

[27] "By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.'" *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987); *see* 29 CFR pt. 1630, App. § 1630.2(1) (explaining that the purpose of the regarded

entertain misperceptions about the individual--it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Sutton v. United Air Lines. Inc.*, 527 U.S. at 489; *see Mahon*, 295 F.3d at 592; *MXGroup, Inc.*, 293 F.3d at 340; *Cotter*, 287 F.3d at 599.

Plaintiff has not alleged, nor supported with evidence, any claim that defendant mistakenly believed that plaintiff had a mental impairment which he did not have. Plaintiff has not alleged or supported with evidence any claim that defendant mistakenly believed that an actual, nonlimiting impairment substantially limited one or more of plaintiff's major life activities. Rather than engaging in the analysis established by the Supreme Court's 1999 decision in *Sutton* and its Sixth Circuit progeny cited in the previous paragraph, plaintiff's brief presents the following argument, set forth in its entirety verbatim below:

> In the context of perceived disabilities, the substantial limitation" on work is satisfied where application by other employers of the same criterion applied by the plaintiff's employer would foreclose a range of jobs. *Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1100-1101 (D Haw 1980).
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> In the case at bar, the criterion applied by Palmer was stated at the June 12, 2001 meeting:
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> > He would not hold eye contact when I speak to him. That means that he cannot be trusted. Also, he was making funny faces at me when

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as prong is to cover individuals "rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities").

> I was reprimanding him, and that is insubordination in my book. (Cpl. 32; accord M540-541)
>
> Since lack of eye contact is a common problem with Asperger's sufferers, terminating all workers who refuse to make eye contact with their employers would foreclose substantially all jobs for Asperger's sufferers. Defendant's application of such a criterion to Plaintiff therefore established a "substantial limitation" on the major life activity, work.

(Plf. Brief at 15-16).

"Substantially limits" a major life activity is only one component of establishing a disability as defined in 42 U.S.C. § 12102(2)(C) and "substantially limits" must be assessed under the demanding standard established by the Supreme Court's *Toyota* decision. 534 U.S. at 196. When work is the major life activity which the plaintiff claims was substantially limited, it is the plaintiff's burden to present evidence that he was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute substantial limitation in the major life activity of working." *Sutton,* 527 U.S. at 491-92; *see Mahon,* 295 F.3d at 591.

E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980), does not support the proposition for which it was cited by plaintiff. *Black* was an action brought by E.E. Black. Ltd., the General Contractors Association of Hawaii, and the Hawaii Employers Council seeking judicial review of a decision by the Assistant Secretary of Labor. The case was a challenge to the provisions of the Rehabilitation Act requiring

contracts entered into by federal department or agency to "'contain a provision requiring that, in employing persons to carry out such a contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title.'" 497 F. Supp. at 1090 (quoting 29 U.S.C. § 706(7)). The regulations then in effect defined "substantially limited" as follows: "'For purposes of this Part, a handicapped individual is 'substantially limited' if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap.'" 497 F. Supp. at 1091 (quoting 41 C.F.R. § 60-741.2 (1980)). The Appendix to 41 C.F.R. § 60-741 went on to state, "The phrase 'substantially limits' means the degree that the impairment affects employability." 497 F. Supp. at 1091. The Assistant Secretary of Labor overruled an ALJ's decision and held that since the impairment "prevented Mr. Crosby from securing the job he wanted, Mr. Crosby was a handicapped individual under the definitions set forth in the Act and regulations." 497 F. Supp. at 1095. The district judge found that the ALJ had read 41 U.S.C. § 60-741.2 too narrowly and that the "Assistant Secretary's interpretation of the Act and regulations [had been] overbroad." 497 F. Supp. at 1099-1100. The district court noted that "employability" under the definitions set forth in 41 C.F.R. § 60.741.2 (1980) and its appendix could not be determined by focusing exclusively on the job criteria or qualifications utilized by the individual employer. It was in this context that the district court stated as follows:

> Factors that are important in the case-by-case determination are the number and types of jobs from which the impaired individual is disqualified. And the focus cannot be on simply the job criteria or qualifications used by the individual employer; those

> criteria or qualifications must be assumed to be in use generally. The reason for this is that an employer with some aberrational type of job qualification (people with straight hair are inferior, and thus I require all job applicants to have curly hair) that screens out impaired individuals who are capable of performing a particular job, should not be able to say: "No one else has this job requirement, so the impairment does not constitute a substantial handicap to employment, and the applicant is not a qualified handicapped individual." If such an approach were allowable, an employer discriminating against a qualified handicapped individual would be rewarded if his reason for rejecting the applicant were ridiculous enough. In evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process.

497 F. Supp. at 1100. Plaintiffs argument clearly takes this quote out of context and attempts to substitute it for evidentiary proof.

Furthermore, nearly twenty years ago in its decision in *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985), the Sixth Circuit rejected the analysis utilized by the Hawaii district court in *Black*. The *Black* "court did not adequately analyze the focus and relationship of the definitional elements of the statute -- impairment, substantial limitation of a major life activity and qualified person." 755 F.2d at 1249. Eight years ago, the regulation at the heart of the *Black* decision, 41 C.F.R. § 60-741.2, was superseded by regulations incorporating the ADA standard of 29 C.F.R. § 1630.2(j), and now expressly states that with respect to the major life activity of working, "the term substantially limits

means significantly restricted in the ability to perform either class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 41 C.F.R. § 60-741.2(q)(3) (2004); *see* 61 Fed. Reg. 19336, 19340 (May 1, 1996); *see also* 57 Fed. Reg. 48084, 48089 (Oct. 21, 1992). *Black* is therefore valueless as precedent.

Plaintiff's argument is also flawed in its temporal focus. Defendant terminated plaintiff's employment on June 8, 2001. (Complaint, ¶ 24). The focus of any claim that defendant "regarded" plaintiff as disabled within the meaning of 42 U.S.C. § 12102(C) must be events occurring at or before plaintiff's termination. Plaintiff has never alleged in his administrative charge or complaint, nor supported with evidence, a claim of discrimination arising from failure to reinstate him after June 8, 2001. There is no evidence before the court that Ralph Palmer attributed plaintiff's inability to maintain eye contact on June 8, 2001, to plaintiff's Asperger's Syndrome. It was only after Palmer purportedly noted plaintiff's inability to maintain eye contact at the June 12, 2001 post-termination meeting that plaintiff made a statement attributing his inability to maintain eye contact to Asperger's Syndrome. Plaintiff's post-termination statement does not and cannot establish that defendant regarded him as disabled under 42 U.S.C. § 12102(C). Defendant is entitled to judgment in its favor as a matter of law on this claim.

IV. Reasonable Accommodation

Counts II-V of plaintiff's complaint are "lack of accommodation" claims. The statutory definition of "discriminate" in section 12112(b), includes "not making

reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that. the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(a)(5)(A). By definition, the employer is not required to make any accommodation where the employee does not have a "disability" as defined by the ADA. Furthermore, "an employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation." *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 951 (7th Cir. 2001).[28]

"The idea of accommodation is to enable an employee to perform the essential functions of his job; an employer is not required to accommodate a disabled worker by modifying or eliminating an essential function of the job." *Matthews v. Denver Post,* 263 F.3d 1164, 1168-69 (10th Cir. 2001). The duty of reasonable accommodation does not require the employer to shift an essential function of the job to other

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[28] "Where the reasonable accommodation requested is unrelated to the limitation, we do not believe an ADA action may lie. Put another way, there must be a causal connection between the major life activity that is limited and the accommodation sought." *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 687 (8th Cir. 2003). "An accommodation is reasonable only if it is related to the accommodated individual's disability." *Allen v. Interior Const. Servs., Ltd.*, 214 F.3d 978, 982 (8th Cir. 2000). An accommodation that is unrelated to the plaintiff's disability is not a reasonable accommodation. *Peebles v. Potter,* 354 F.3d 761,769 (8th Cir. 2004).

employees. *See Frazier v. Simmons,* 254 F.3d 1247, 1261 (10th Cir. 2001).

An employee's failure to request a cognizable, reasonable accommodation entitles the employer to judgment as a matter of law. *Burch v. Coca-Cola Co.,* 119 F.3d 305, 318-20 (5th Cir. 1997). "[T]he plaintiff bears the burden of establishing that the accommodation he or she sought [was] reasonable." *Walsh v. United Parcel Servs.,* 201 F.3d 718, 725 (6th Cir. 2000); *Monette v. Electronic Data Sys. Corp.,* 90 F.3d 1173, 1187 (6th Cir. 1996); *see also Tubbs v. Formica Corp.,* No. 01-3876, 2004 WL 1791405, at * 2 (6th Cir. Aug. 6, 2004). As part of plaintiff's prima facie case, "The employee must show that the accommodation is reasonable in the sense of both efficacious and of proportional to costs." *Vande Zande v. Wisconsin Dep't of Admin.,* 44 F.3d 538, 543 (7th Cir. 1995).[29] "To defeat an employer's motion for summary judgment, the employee must first demonstrate that an accommodation appears reasonable on its face." *Mason v. Avaya Communications, Inc.,* 357 F.3d 1114, 1122 (10th Cir. 2004).

It is well established that it is the burden of the employee to request reasonable accommodation. *See Lockard v. General Motors Corp.,* No. 01-3186, 2002 WL 31780957, at * 6 (6th Cir. Dec. 11,2002) (citing *Taylor v. Phoenixville Sch. Dist.,* 174 F.3d 142, 165 (3d Cir. 1999)); *McDonald v. Ford Motor Co.,* 208 F. Supp. 2d 837, 844-45 (N.D. Ohio 2002). In *Lockhard,* the Sixth Circuit observed that an employee cannot

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[29] "Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health." *Vande Zande,* 44 F.3d at 543.

expect that the employer will read his mind and know he secretly wanted a particular accommodation. 2002 WL 31780957, at * 6 (citing *Brown v. ChaseBrass & Copper Co.*, No. 00-3308, 2001 WL 814931, at * 5 n.2 (6th Cir. July 10, 2001)). Plaintiff has not presented any evidence that Asperger's Syndrome somehow prevented him from requesting an accommodation. *Id.; see also Calvin v. Ford Motor Co.*, 185 F. Supp. 2d 792, 799 (E.D. Mich. 2002). Plaintiff never made any written request to BEPCO for any specific form of accommodation based upon specific limitations stemming from any physical or mental impairment. Upon review, the court finds that all of the oral requests plaintiff claims to have made were unreasonable as a matter of law.

A. Additional Paid Leave

Plaintiff's request for additional paid leave was not a request for reasonable accommodation. *See Myers v. Hose,* 50 F.3d 278, 283 (4th Cir. 1995). "Requiring paid leave in excess of an employee's scheduled amount would unjustifiably upset the employer's settled budgetary expectations, and thus cannot be construed as a reasonable accommodation." *Myers,* 50 F.3d at 283; *see* 29 C.F.R. App. 1630.2(o) (2001) (Reasonable accommodation "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. . . .").

B. Unpaid Leave of Unspecified Duration

The federal courts have repeatedly held that requests for unpaid leave of indefinite duration are not requests for reasonable accommodation. *See Walsh v. United Parcel Servs.*, 201 F.3d 718, 725-27 (6th Cir. 2000); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1187 (6th Cir.

1996); *see also Wood v. Green,* 323 F.3d 1309, 1312-14 (11th Cir. 2003); *Boykin v. ATC/Vancom of Colorado,* L.P., 247 F.3d 1061, 1064-65 (10th Cir. 2001). *Myers v. Hose,* 50 F.3d at 283. An employer is not required to restructure the position "to accommodate the plaintiff's erratic work habits. Forcing an employer to accommodate unpredictable tardiness or absenteeism is unreasonable even if it is a direct result of the employee's disability. No employer could effectively do business without a reliable workforce." *Palazzolo v. Galen Hosp. of Tx., Inc.,* No. 1:96cv2550TWT, 1997 WL 837951, at * 4 (N.D. Ga. Nov. 25, 1997). An employee's request to be absent from the workplace whenever he felt he needed to leave is not a request for reasonable accommodation. *See EEOC v. Yellow Freight Sys., Inc.,* 253 F.3d at 948-49. As the Seventh Circuit sitting *en banc* observed, "[I]n most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are the result of a disability. The fact is that in most cases, attendance at the job site is a basic requirement of most jobs. . . . [N]o business is obligated to tolerate erratic, unreliable attendance." *Yellow Freight,* 253 F.3d at 948-49.

C. Stress Time

Plaintiff argues that he was denied reasonable accommodation in the form of "stress time" whenever he needed a break. Plaintiff has not cited a single instance during his years of employment at BEPCO where he was denied a break or reprimanded for taking an unauthorized break. To the extent that plaintiff was seeking leave to avoid all stresses within the workplace, such a request is a request for unreasonable accommodation as a matter of law. *See Reed v. Lepage Bakeries, Inc.,* 102 F. Supp. 2d 33, 37 (D. Me. 2000)(granting summary judgment in favor of employer, finding that plaintiff's request for accommodation in the form

of leave to "walk away and not listen to her supervisors" based on mental impairments of bipolar disorder and post traumatic stress syndrome was unreasonable), *aff'd*, 244 F.3d 254 (1st Cir. 2001).

D. Working Non-Core Hours

A request for an open-ended work schedule that would allow the employee to come and go as he pleased is not a request for reasonable accommodation. *See Amadio v. Ford Motor Co.*, 238 F.3d 919, 928 (7th Cir. 2001); *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 900 n.9 (7th Cir. 2000). It is well-established that reasonable accommodation is not an obligation to provide the accommodation the employee would prefer. *See Rehling v. Chicago*, 207 F.3d 1009, 1014 (7th Cir. 2000). The record shows that plaintiff's presence was not required during the early morning hours plaintiff preferred to work. Plaintiff's absence during the regular workday can adversely affect production. Plaintiff preferred to avoid traffic and arrive home early in the evening to make dinner. The "obligation of accommodation does not extend to modifications requested primarily for personal benefit of the disabled individual." *Boykin v. ATC/Vancom of Colorado*, L.P.,247 F.3d at 1066.

E. Work at Home without Supervision

"Generally, [] an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home. This is the majority view. . . ." *Vande Zande*, 44 F.3d at 544-45 (collecting cases). "An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced. No doubt to this as to any generalization about so complex and varied activity as

employment, there are exceptions, but it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home." *Id.* at 545; *see Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1119-20 (10th Cir. 2004). This is not such an extraordinary case. Plaintiff's own testimony with regard to his need to be present to answer questions other employees might have regarding his drawings undermines any assertion to the contrary.

F. Transfer To Work Under A Different Supervisor.

Count III of plaintiff' s complaint asserts that defendant's "lack of accommodation after being informed of the Plaintiff's request of group reassignment" violated the ADA. (Plf. Brief, docket # 85). Plaintiff's complaint refers to a late 2000 meeting wherein Engineering Manager Ralph Palmer had purportedly stated that no other employee had the power to choose which group they worked for. (Complaint ¶ 10). It is undisputed that plaintiff was reassigned to the Dynamometer group on December 11, 2000, in response to plaintiff's request not to have Munir Ozdemir perform his year 2000 performance review, a request to which BEPCO acceded. Plaintiff has not presented any legal authority that would allow plaintiff to choose unilaterally his group assignments and managers. Plaintiff's request for accommodation in this regard was unreasonable as a matter of law.

In *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 579 (3d Cir. 1998), the Third Circuit held that an employee's "request to be transferred away from coworkers who subjected him to prolonged and inordinate stress was unreasonable as a matter of law under the ADA" and affirmed

the trial court's grant of summary judgment in favor of the defendant. The employee had been diagnosed as suffering from depression and anxiety-related disorders and indicated that he had difficulty working with specific co-workers. The Third Circuit found that the requested accommodation was unreasonable as a matter of law for at least three reasons. First, the proposed accommodation "would impose a wholly impractical obligation upon AT&T or any employer. Indeed, AT&T could never achieve more than temporary compliance because compliance would depend entirely on Gaul's stress level at any given moment. This in turn, would depend upon an infinite number of variables, few of which AT&T controls. Moreover, the term 'prolonged and inordinate stress' is not only subject to constant change, it is also subject to tremendous abuse. The only certainty for AT&T would be its obligation to transfer Gaul to another department whenever he becomes 'stressed out' by a coworker or supervisor. It is difficult to imagine a more amorphous 'standard' to impose on an employer." 134 F.3d at 581. Second, the proposed accommodation would require a level of oversight in monitoring and limiting plaintiff's stress level that is simply not required by law. Third, by asking to be transferred away from individuals who caused him prolonged and inordinate stress, the plaintiff was "essentially asking the court to establish the conditions of his employment, most notably, with whom he will work. However, nothing in the ADA allows this shift in responsibility. Indeed, nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions withing an

organizational hierarchy." 134 F.3d at 581 (citations omitted).[30]

In Coulson v. Goodyear Tire & Rubber Co., No. 00-3818, 2002 WL 408872 (6th Cir. Mar. 14, 2002), the United States Court of Appeals for the Sixth Circuit affirmed the trial court's grant of summary judgment in favor of defendant upon a similar claim. Prior to his termination, Coulson had obtained an opinion from a Dr. Robert Rodriguez "suggest[ing] that Coulson should be transferred to another department under different supervisors" based upon plaintiff's mental impairments. *Id.* at 2. The employer denied the request, and plaintiff's subsequent ADA claim asserted that the employer had failed to reasonably accommodate plaintiff's mental impairment. The Sixth Circuit noted that while transfer or reassignment of an employee is within the realm of possible reasonable accommodation, even in those cases where transfer is shown to be appropriate, "an employer is only required to transfer the employee to a vacant position." *Id.* at * 5 (collecting cases).[31] The court reaffirmed its holding in *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 257 (6th Cir. 2000) that an employer is not required to reassign the employee to a position for which he is not qualified in order

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[30] A request for a work space isolated from co-workers is likewise an unreasonable request for accommodation. *See St. Hillaire v. Minco Prod., Inc.*, 288 F.Supp. 2d 999, 1005-06 (D. Minn, 2003).

[31] The ADA was intended to provide disabled persons with the same work opportunities as nondisabled persons. It did not create a form of privileged status requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. *See Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995).

to accommodate the individual and that the employer is not required to create new jobs to accommodate disabled employees. *Coulson,* 2002 WL 408872, at * 5. The Sixth Circuit found that Coulson's request for accommodation was unreasonable because he had not submitted evidence establishing that a job opening for which he was qualified existed. *Id.* at 6. The Court of Appeals concluded as follows:

> Coulson is seeking to force Goodyear to transfer him so that he will not be required to work with certain people. As the magistrate judge noted, this would be asking the court to "establish the conditions of his employment, most notably with whom he will work." *Gaul v. Lucent Technologies, Inc.,* 134 F.3d 576, 581 (3d Cir. 1998). Courts are not meant to act as a super-bureau of Human Resources. Since Coulson's proposed accommodation was unreasonable, grant of summary judgment was appropriate.

Coulson, 2002 WL 408872, at * 6; *see also Rehling v. Chicago,* 207 F.3d at 1015 (affirming summary judgment entered in favor of defendant because the plaintiff requesting accommodation in the form of a transfer had not carried his burden of establishing that a vacant position existed for which he was qualified). Plaintiff has not identified any open job to which he could have been assigned.

G. Software

Count IV of plaintiff's complaint asserts that defendant's "lack of accommodation after being informed of the plaintiff's request of 'software package usage'" violated the ADA. It is undisputed that final assembly drawings were required to be completed in three-dimensional format. During his employment, plaintiff learned the 2-D AutoCAD software

program. Defendant allowed plaintiff to utilize this software throughout his employment, despite the burden this practice placed on others to convert plaintiffs drawings into a three-dimensional format. Defendant encouraged plaintiff to upgrade his computer skills and learn new computer programs. Plaintiffs psychologist testified that plaintiff was capable of learning new programs. Even assuming that plaintiff had a disability within the meaning of the ADA, any limitation with regard to computer programs had been more than reasonably accommodated by defendant.

H. Lack of Good-Faith Negotiations

Count I of plaintiff's complaint asserts that defendant violated the ADA through a lack of good faith negotiations after being informed of plaintiff's disability. Plaintiff provided Diane Roodvoets with a copy of Psychologist Zwart's May 8, 2000 report listing his "diagnostic impressions" that plaintiff had "Asperger's Disorder" and "dysthymia," but he did not offer any suggestion as to what sort of accommodation those conditions might require. Plaintiff did not request any specific form of accommodation at that time. (Complaint, ¶ 4). In *Lockhard v. General Motors Corp.*, the Sixth Circuit observed that an employee cannot expect that the employer will read his mind and know he secretly wanted a particular accommodation. *See Lockard v. General Motors Corp.*, No. 01-3186, 2002 WL 31780957, at * 6 (6th Cir. Dec. 11, 2002) (citing *Brown v. Chase Brass & Copper,* No. 00-3308, 2001 WL 814931, at * 5 n.2 (6th Cir. July 10, 2001)). Plaintiff has not presented any evidence that Asperger's Syndrome or dysthymia somehow prevented him from requesting an accommodation. *Case Brass & Copper,* 2001 JWL 814931, at * 5 n.2.; *see also Calvin v. Ford Motor Co.*, 185 F. Supp. 2d 792, 799 (E.D. Mich. 2002)("[W]here an employee is able to request an accommodation but fails to do so, the

employer's duty to confer does not arise."). Plaintiff never made any written request to BEPCO for any specific form of accommodation based upon specific limitations stemming from mental impairments. An employer's duty to engage in an interactive search for reasonable accommodation does not arise until after an employee makes a request for reasonable accommodation. *Lockhard,* 2002 WL 31780957, at * 6; *Brown v. Chase Brass & Copper,* 2001 WL 814931, at * 5 n.2. As shown in preceding sections of this opinion, plaintiff's oral requests for accommodation were unreasonable as a matter of law.

Under the ADA, an employer cannot be held independently liable for an ADA violation by simply failing to engage in an interactive process to determine reasonable accommodations. *See Barnett v. U.S. Air, Inc.,* 157 F.3d 744, 752-53 (9th Cir. 1998); *Willis v. Conopco, Inc.,* 108 F.3d 181, 285 (11th Cir. 1997); *White v. York Int'l Corp,* 45 F.3d 357, 363 (10th Cir. 1995); *see also Emerson v. Northern States Power Co.,* 256 F.3d 506, 515 (7th Cir. 2001); *accord Peebles v. Potter,* 354 F.3d 761,769 (8th Cir. 2004) (After finding that as a matter of law the accommodation that plaintiff had requested was unreasonable, any discussion concerning the interactive process would be "superfluous."). Because the court has determined that the accommodations plaintiff claims he orally requested were unreasonable as a matter of law, defendant is entitled to judgment in its favor as a matter of law on this dependent claim.

Even assuming that plaintiff had somehow triggered the interactive process, it was plaintiff's burden to establish that defendant exercised bad faith. *Lockhard,* 2002 WL 31780957, at * 6. "To bear liability for a failure to accommodate, the employer must be responsible for a breakdown in the interactive process." *Id.* (citing *Templeton v. Neodata Servs.,*

Inc., 162 F.3d 617, 619 (10th Cir. 1998)). "In this regard, courts have held that an employer is not responsible for a breakdown in the interactive process unless the employer actually failed to offer a reasonable accommodation." *Lockhard*, 2002 WL 31780957, at * 6 (citing *Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000)). Plaintiff has provided no evidence to support such a conclusion.

V. Retaliation

Neither plaintiff's administrative charge nor his complaint in this court include any retaliation claim.[32] Undaunted, plaintiff argues in his brief that a reasonable trier of fact could find that defendant "retaliated" against plaintiff. (Plf. Brief at 24-25). Plaintiff may not ignore such fatal defects.

Plaintiff's complaint does not include any claim against defendant for retaliation. The court's January 30, 2003 case management order set March 1, 2003, as the deadline for amendment of pleadings. (docket # 10, ¶ 2). The court's second case management order entered on July 24, 2003 expressly stated that "all motions to amend the pleadings must be filed by September 1, 2003." (docket # 40, ¶ 2). December 23, 2003 amendments to the second case management order (docket # 58) left the September 1, 2003 deadline for amendment of the pleadings undisturbed. (docket #'s 13, 40, 58). Plaintiff has been represented by counsel in this matter since August 2003 (docket #'s 41, 43). No motion to amend the case management order or motion for leave to

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[32] The ADA prohibits retaliation "against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]." 42 U.S.C. § 12203.

amend the complaint to include a retaliation claim has ever been filed with the court. Even if the court were now to indulgently treat argument appearing in plaintiff's brief as a "motion" to amend the case management order, plaintiffhas not and could not demonstrate the "good cause" required by Rule 16 at this juncture. *See Leary v. Daeschner,* 349 F.3d 888, 906-09 (6th Cir. 2003). "[G]ood cause is measured by the movant's diligence in attempting to meet the case management order's requirements." *Id.* at 906. Plaintiff has made no showing in this regard. "Another important consideration for a district court deciding whether Rule 16's "good cause" standard is met is whether the opposing party will suffer prejudice by the amendment." *Id.* The prejudice to defendant at this juncture is patent. Discovery in this case has been closed for months. The deadline for dispositive motions has likewise passed. The court finds no basis, much less the "good cause" required by Rule 16 of the Federal Rules of Civil Procedure, upon which to disturb the case management order.

Plaintiff also faces the barrier that his administrative charge did not include any claim of retaliation. (docket # 87, Ex. 2). Neither the word retaliation nor facts suggesting any claim of retaliation appear on the face of plaintiff's administrative charge. Plaintiff limited his claim to an assertion that his employer subjected him to discrimination on the basis of a disability. *(Id.).* This court's review is limited to the scope of the EEOC investigation reasonably expected to grow out of plaintiffs charge of discrimination. *See Weigel v. Baptist Hosp. of E. Tenn.,* 302 F.3d 367, 380 (6th Cir. 2002); *EEOC v. Wilson Metal Casket Co.,* 24 F.3d 836, 840 n.3 (6th Cir. 1994) (citing *EEOC v. Bailey Co.,* 563 F.2d 439, 447 (6th Cir. 1977)); *see also Davis v. Sodexho, Cumberland College Cafeteria,* 157 F.3d 460, 464 (6th Cir. 1998); *McCormack v. Frank,* No. 93-5146, 1994 WL

419589, at *4 (6th Cir. Aug. 10, 1994). "Retaliation claims that occurred before the filing of the EEOC charge must be included in that charge." *Strouss v. Michigan Dep't of Corrections,* 250 F.3d 336 342 (6th Cir. 2001). Plaintiff's "retaliation" claim (as "defined" by his brief) is not within the scope of the investigation reasonably expected to grow out of plaintiff's administrative charge of discrimination. *See Weigel v. Baptist Hop. of East Tenn.,* 302 F.3d at 380; *Duggins v. Steak'N Shake,* 195 F.3d 828, 833 (6th Cir. 1999); *Ang v. Proctor & Gamble Co.,* 932 F.2d 540, 546-47 (6th Cir. 1991).

VI. Termination of Plaintiff's Employment

"[T]he ADA does not insulate an employee from adverse action taken by an employer because of misconduct in the workplace, even if his improper behavior is arguably attributable to an impairment. In short, an employee cannot hide behind the ADA and avoid accountability for his actions." *Bennett v. Calabrian Chem. Corp.,* 324 F. Supp. 2d 815 (E.D. Tex. 2004); *see Hamilton v. Southwestern Bell Tel. Co.,* 136 F.3d 1047, 1054 (5th Cir. 1998); *Williams v. Widnall,* 79 F.3d 1003, 1007 (10th Cir. 1996); *Maddox v. Univ. of Tenn.,* 62 F.3d 843, 846-48 (6th Cir. 1995) (unacceptable misconduct of alcoholic distinct from the status of disability); *Ray v. Kroger Co.,* 264 F. Supp. 2d 1221 (S.D. Ga. 2003) (granting summary judgment in favor of defendant where individual with Tourette's Syndrome fired for blurting out vulgar language and racial slurs, because the ADA is not violated when an employer discharges an individual based on misconduct, even if the misconduct is related to an impairment), *aff'd,* No. 03-12919, 2003 WL 23186025 (11th Cir. Dec. 17, 2003); *Maes v. Henderson,* 33 F. Supp. 2d 1281, 1288-89 (D. Nev. 1999) (ADA does not insulate employee from outbursts blamed on an impairment). To

recover on a claim that the termination of his employment violated the ADA, plaintiff must show that: (1) he was an individual with a disability as of his termination on June 8, 2001; (2) that he was "otherwise qualified" to perform the job requirements, with or without accommodation; and (3) that he was discharged solely by reason of his handicap. *See Monette v. Electronic Data Sys., Inc.*, 90 F.3d 1173, 1178 (6th Cir. 1996); *Maddox v. University of Tenn.*, 62 F.3d 843,846 (6th Cir. 1995).

Plaintiff's threshold burden with regard to demonstrating that he was "disabled" within the meaning of the ADA has already been addressed at length above. Defendants have never disputed that plaintiff was otherwise qualified for the mechanical project engineer position on and before the date of his termination. This section of the court's opinion examines plaintiff's burden and the evidence proffered by plaintiff on the issue of whether plaintiff was discharged solely by reason of his handicap.[33] "A plaintiff may prove that he was discriminated against based on his disability either through direct or indirect evidence." *Hendrick v. Western Reserve Care Sys.*, 355 F.3d 444, 452 (6th Cir. 2004). "Direct evidence is evidence that proves the existence of a fact without requiring any inferences." *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 548 (6th Cir. 2004).

Plaintiff argues that there is direct evidence that he was terminated solely on the basis of disability based upon statements Ralph Palmer purportedly made at the June 12,

---

[33] Plaintiff's brief attempts to invoke the employee handbook in support of this claim. Plaintiff has never asserted any state-law claim in this court for breach of an employment contract. The September 1, 2003 deadline for amending the pleadings to include such a claim has long since passed. (docket # 40, Ex. 2).

2001 post-termination meeting. Plaintiff argues that in justification of his claim of "insubordination," Palmer cited (a) that plaintiff could not hold eye contact with Palmer, and therefore could not be trusted and (b) would not respond to Palmer. (Plf. Brief at 17-18). Obviously, the ADA is not violated by a superior discussing substandard job performance on a particular project with an employee. *See Tyndall v. National Educ. Centers, Inc.*, 31 F.3d 209, 215 (4th Cir. 1994) ("the ADA does not discontinue the dialogue on problems such as substandard job performance or absence from work."). The undisputed evidence is that plaintiff did respond to Palmer's inquiry as to why there were so many problems on plaintiff's projects, and to Ralph Palmer's apparent belief that problems stemmed from plaintiff's inability to draw well. Plaintiff heard Palmer, understood what Palmer had said, and elected to confront Palmer by stating, "How would you know?" Plaintiff also laughed and made faces when Palmer reminded plaintiff that he was his supervisor and could fire him at any time, to which plaintiff replied that Palmer would never get away with it.

The court has carefully reviewed the record and is unable to discern any evidence that could somehow transform Ralph Palmer's purported statements on June 12, 2001, into direct evidence that on June 8, 2001, he terminated plaintiff's employment at BEPCO solely on the basis of plaintiff's disability. The evidence shows that plaintiff did provide a copy of Psychologist Zwart's May 8, 2000 report to Diane Roodvoets, BEPCO's Human Resources Director. The court will further assume, although no evidence shows it, that Ralph Palmer had access to this document and read it. The only place avoidance of eye contact is even mentioned in the report is a passing reference recording a complaint by plaintiff s wife Corinne. (docket # 86, Bates-Stamped Ex. 1134). It does not appear in Psychologist Zwart's summary of the diagnostic

criteria for Asperger's Syndrome. *(Id.* at 1135). The report most definitely did not suggest that plaintiff, or any individual with Asperger's, would respond as plaintiff did on June 8,2001. Psychologist Zwart did state in extremely general terms that primary issues affecting many adults with Asperger' s Syndrome are the "subtle social difficulties which can also be challenged by the social and emotional demands of marriage. The rigidity of style and idiosyncratic perspective on the world can make interactions difficult, both inside and outside of the family." *(Id.* at 1136). This cannot transform Ralph Palmer's post-termination statements that plaintiff had been insubordinate in making funny faces and could not be trusted because he would not maintain eye contact (Plf. Dep. at 540-41) into direct evidence of discrimination.

Even when a plaintiff cannot present direct evidence of discrimination, it may be possible to establish the necessary elements of an ADA violation indirectly. The *McDonnell Douglas* burden-shifting approach applies to such claims. *Hendrick,* 355 F.3d at 453. The Sixth Circuit defines the elements of a *prima facie* case as follows:

> [P]laintiff may establish a prima facie case of discrimination by showing: (1) he or she is disabled; (2) otherwise qualified for the position, with or without reasonable accommodation; (3) suffered an adverse employment decision; (4) the employer knew or had reason to know of plaintiff's disability; and (5) the position remained open while the employer sought other applicants or the disabled individual was replaced. The defendant must then offer a legitimate explanation for its action. If the defendant satisfies this burden of production, the plaintiff must introduce evidence showing that the proffered explanation is

> pretextual. Under this scheme, the plaintiff retains the ultimate burden of persuasion at all times.

Hendrick, 355 F.3d at 453 (quoting *Monette,* 90 F.3d at 1186-87); *see also Brenneman v. Medical Health Sys.,* 366 F.3d 412, 417-18 (6th Cir. 2004). Plaintiff argues in a footnote that he has met his burden under the *McDonnell-Douglas* analysis. (Plf. Brief at 18, n.7). Plaintiff has not presented any evidence that he was replaced after he was terminated or that his position remained open while BEPCO sought other applicants for his position. The undisputed evidence before the court is that plaintiff's position was not filled after plaintiffs termination. Plaintiff has not satisfied the requirements of a *prima facie* case.

Even assuming that plaintiff had presented evidence to support a *prima facie* case, defendant is nonetheless entitled to judgment in its favor as a matter of law. Defendant has presented plaintiffs insubordinate comments and behavior on June 8, 2001, as a legitimate, nondiscriminatory reason for plaintiff's termination, and plaintiff has not presented evidence upon which a reasonable trier of fact could find that the proffered explanation is a pretext for discrimination. *See Hendrick,* 355 F.3d at 453.

VII. Medical Records

Plaintiff's claim asserting that BEPCO violated the ADA by "keeping plaintiff's medical diagnostic documentation in the regular Human Resources employee files" requires little discussion. (Complaint, Count VII, p. 8). Diane Roodvoets's testimony that BEPCO maintained separate medical files for its current employees is unrebutted. The only evidence plaintiff presented with regard to this claim was a vague assertion in deposition testimony that when defendant

provided him with a copy of his human resources file, Psychologist Zwart's report was not in that file. (Plf. Dep. at 399). This does not suffice to create a genuine issue of fact for trial upon plaintiff's record-keeping claim.

The ADA contains specific statutory prohibitions and restrictions concerning medical examinations conducted by a covered entity and requirements that the information collected pursuant to such examinations be maintained by the employer on separate forms and in separate medical files.

The ADA does not contain any record-keeping restrictions regarding medical records an employee may obtain on his own and subsequently elect to volunteer to his employer. Section 12112(d) states as follows:

> (d) Medical examinations and inquiries
>
> (1) In general
>
> The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.
>
> (2) Preemployment
>
> (A) Prohibited examination or inquiry
>
> Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.
>
> (B) Acceptable inquiry
>
> A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.
>
> (3) Employment entrance examination
>
> A covered entity may require a medical examination after an offer of employment has been

made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that-

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter. -

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical

> histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.
>
> (C) Requirement
>
> Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. § 12112(d). Plaintiff has not alleged that he was subjected to any preemployment examination under section 1211(d)(2), an employee entrance examination under section 12112(d)(3), or that defendant conducted any medical examination under section 12112(d)(4). There is no allegation that records generated by defendant pursuant to such employer-directed examinations were not kept in a proper location. The ADA's medical record-keeping provisions do not apply to medical records that plaintiff obtained on his own from a medical provider which he later voluntarily provided to his employer. *See Cash v. Smith,* 231 F.3d 1301, 1307 (11 th Cir. 2000)(§ 12112(d) does not apply to voluntary disclosures initiated by the employee); *Rohan v. Networks Presentation LLC,* 175 F. Supp. 2d 806, 813-14 (D. Md. 2001); *Yoder v. Ingersoll-Rand Co.,* 31 F. Supp. 2d 565, 569 (N.D. Ohio 1997), *aff'd,* No. 97-3710, 1998 WL 939885, at * 2 (6th Cir. Dec. 22, 1998). Defendant is entitled to judgment in its favor as a matter of law upon this claim because plaintiff has not alleged or supported with evidence any claim regarding the limited class of medical records subject to statutory record-keeping restrictions under 42 U.S.C. § 12112(d).

Conclusion

Upon review, the court determines that plaintiff failed to meet the threshold burden of establishing a "disability" as that term is defined in 42 U.S.C. § 12102(2), that plaintiff's requests for accommodation were unreasonable as a matter of law, that no duty to confer was triggered or violated, that plaintiff's administrative charge and complaint did not include any retaliation claim and that plaintiff failed to support any such claim with evidence, that plaintiff failed to establish a *prima facie* case with regard to the termination of his employment or demonstrate that defendant's legitimate nondiscriminatory reasons for terminating his employment were pretextual, and that defendant did not violate the ADA's statutory record-keeping requirements. Accordingly, defendant's motion for summary judgment (docket # 80) will be granted and judgment entered in defendant's favor on all plaintiff's claims.

Dated: September 2, 2004

/s/_____

Joseph G. Scoville
United States Magistrate Judge

(3)

No. 05-1565

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DANIEL LEE MERRILL, SR.,

Petitioner,

v.

BURKE E. PORTER MACHINERY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Has the Petitioner shown any compelling reason for this Court to review the *McDonnell Douglas* burden-shifting framework as applied in the context of a reduction in force, where Petitioner was not discharged because of or during a workforce reduction, where Petitioner did not present this issue for decision in the District Court or the Court of Appeals, and where there is no split among the Circuit Courts on the issue?

2. Has the Petitioner shown any compelling reason for this Court to review whether a disability must be the "sole" cause or only a "motivating" cause to prove a claim under the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, where both the District Court and the Court of Appeals applied uniformly-accepted proof standards in analyzing the evidence, and where the semantic distinction between a "sole" cause and a "motivating" cause had no effect on either court's decision?

3. Has the Petitioner shown any compelling reason for this Court to review whether the ability to "interact with" coworkers constitutes a "major life activity" under the ADA, where Petitioner did not present this issue for decision in the Sixth Circuit, where there is minimal authority among the Circuit Courts on the issue, and where Petitioner cannot establish that he was substantially limited in this ability in any event?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Burke E. Porter Machinery Co., has no parent corporation and there is no publicly-held company that owns 10% or more of its stock.

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COUNTER-STATEMENT OF THE CASE

I. SUMMARY OF PROCEEDINGS

This case arises under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. On June 8, 2001, Burke E. Porter Machinery Co. ("BEPCO") terminated the employment of Petitioner Daniel Merrill because he blatantly defied his supervisor's efforts to improve his serious and continuing performance problems.

Petitioner alleges that he has a "disability" under the ADA and that his discharge was motivated by the alleged disability (Compl. ¶¶ 1, 4, JA13).[1] In a thorough opinion (Pet. 11a), the District Court granted BEPCO's motion for summary judgment on the following grounds:

1. Petitioner failed to establish that he had a disability under the ADA, because the undisputed facts showed that he was not "substantially limited" in any "major life activity" (Pet. 76a-94a);

2. There was no "direct evidence" of disability discrimination (Pet. 117a-119a);

3. There was no circumstantial evidence of discrimination, and Petitioner could not establish a *prima facie* case of discrimination under *McDonnell Douglas* (Pet. 119a-120a); and

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1. "JA" refers to the pages of the Joint Appendix filed in the Sixth Circuit Court of Appeals. The District Court dismissed additional claims of retaliation and failure to accommodate, and Merrill did not appeal those decisions.

4. There was no evidence that BEPCO's nondiscriminatory reasons for terminating Petitioner's employment were pretextual (Pet. 120a).

The Sixth Circuit affirmed on the ground that there was neither direct nor circumstantial evidence of discrimination (Pet. 9a-10a). Merrill's petition for rehearing en banc was denied (Pet. 2a).

II. STATEMENT OF FACTS

A. *Background*

BEPCO designs and manufactures large specialized machines, including emission dynamometers and vehicle testing equipment. At the time of Merrill's termination, BEPCO employed approximately 197 employees (Palmer Aff. ¶ 1; JA 122).

Merrill became employed by BEPCO in May 1997 as a mechanical project engineer (Merrill Dep. 28, 93; JA 131; 303). The mechanical project engineer is responsible for designing a machine that meets the customer's specifications in a timely and profitable manner, and is ultimately accountable for any mistakes or problems with the design (Merrill Dep. 103, 105, 111, 123-124, 491-493; Palmer Dep. 35; JA 304-305, 143, 203-204; 267).

B. *Merrill's Performance Problems*

In the summer of 2000, Ralph Palmer became BEPCO's Director of Engineering. Palmer was charged with identifying and fixing quality problems within the engineering group (Palmer Dep. 13, 36-37; JA 262, 267). At the time, Merrill

was working in the "End of Line" engineering group (Merrill Dep. 178; JA 152). His supervisor was critical of Merrill's performance and complained to Palmer about Merrill's technical abilities and productivity (Palmer Dep. 19-20; Roodvoets Dep. 72-73; JA 263, 278).

In December 2000, at Merrill's request, he was transferred to the Dynamometer Engineering Group ("Dyno Group") under supervisor John Clawson (Merrill Dep. 178-179; Merrill Dep. Ex 33; JA 152-153; 247). Around April 2001, Clawson was transferred (Palmer Dep. 21; JA 263), and Palmer began directly supervising the Dyno Group engineers including Merrill (Palmer Dep. 18, 22; JA 263, 264).

In the spring of 2001, one after another of Merrill's projects had serious problems that required Palmer's attention (Palmer Dep. 24-34; JA 264-267) (Palmer Aff. ¶ 2; JA 122). It is undisputed that the following problems occurred on machines Merrill designed and were brought to his attention:

1) *2-Wheel-Drive Dynamometer for General Motors-Delphi)*: In the spring of 2001, this machine required significant re-work in the shop and repairs had to be done at the customer's site in Rochester, New York (Merrill Dep. 276-277, 340-341, 513; JA 167, 177, 208).

2) *4-Wheel-Drive Post Restraint System for Ford*: In the spring of 2001, BEPCO's shop personnel became very upset and several meetings were called, because Merrill had specified unnecessarily difficult and expensive machining, failed to include welding instructions, and provided inconsistent assembly instructions (Merrill Dep. 358, 479-483; JA 180, 201-202) (Palmer Dep. 27-

31; JA 265-266). He also specified a tap that BEPCO did not stock, and work on the project had to stop for several days until the fabrication department was able to obtain the new tap (Merrill Dep. 482-483; JA 202).

3) *4WD dynamometer for GM-Milford)*: In the spring of 2001, the centering lift system on this machine failed as BEPCO was preparing to ship it to the customer (Merrill Dep. 231, 243, 272-273; JA 161, 162, 166). Also, the machine was mistakenly designed with fasteners in both SAE (or inch) measurements and metric measurements incorporated into the same machine (Merrill Dep. 245-246, 428; Palmer Dep. 31-32; JA 162, 192; 266). Plaintiff testified: "I will admit having the frame [of the machine] basically metric and having the [motor] basically SAE was not good" (Merrill Dep. 430-431; JA 193). There were also fabrication and machining problems on some of the parts Merrill designed for this machine (Merrill Dep. 348; Palmer Dep. 31-32; JA 179; 266). A recovery plan was put into place because the project, which Merrill described as a "fiasco," was substantially late (Merrill Dep. 349, 471; JA 179, 199).

4) *Motorcycle Dynamometer for Jialing:* Several days before Merrill was terminated, Palmer told him to look over the centering system on this machine because shop personnel reported that it was loose and that the pivot bolt Merrill had designed was too small (Merrill Dep. 36, 274, 476-477; Palmer Dep. 32; JA 132, 167, 201; 266). On the day Merrill was terminated, Palmer called him to the machine shop because the machine could not be assembled the way Merrill had designed it (Merrill Dep. 360-361; Palmer Dep. 32; JA 180; 266). (This was the incident that led up to Merrill's termination.)

5) *Tandem axle roll brake test machine for Hyundai*: Merrill acknowledged that there were "a lot of issues" with this project and it was "a huge service nightmare" (Merrill Dep. 252; JA 164). In the spring of 2001, the machine's rollers were causing tire damage at the customer's site in Korea, and BEPCO employees had to travel there to service the machine (Merrill Dep. 249, 252; JA 163-164). Also, a belt tensioner Merrill designed broke during operation; Merrill redesigned the part, the new part was made and installed, but it broke again (Merrill Dep. 246, 249; JA 162, 163). The machine kept falling apart, and others at BEPCO believed it was under-built, under-powered, and never should have been sold (Merrill Dep. 278; JA 168).

6) *Automatic chocking system for Ford*: On May 14, 2001, the customer reported a "major failure" on this machine and said the "system is inoperable" (Merrill Dep. 293, 297; Merrill Dep. Ex. 14; JA 171, 172; 227). Merrill's design error caused a failure of the mechanism that was used to chock the vehicle's tires (Merrill Dep. 287-288, 297; JA 170, 172). Merrill also failed to design the machine to accommodate tires of up to 36 inches as the customer had specified (Merrill Dep. 291-292; JA 171).

7) *Rolling master for KIA:* Merrill used an inappropriate wheel assembly, causing a front wheel to come loose during use at the customer's site in Korea. BEPCO employees had to travel to Korea to service the machine. In addition, the rear hub became loose due to Merrill's failure to add a thrust key or to provide appropriate assembly instructions (Merrill Dep. 311, 317, 326-327, 330-331; JA 173-176).

Palmer discussed these issues with Merrill during the months before his termination and made it clear that Merrill needed to improve (Palmer Dep. 37-39; JA 267-268; Merrill Dep. Ex. 46, p3, and Merrill Dep. 534-536; JA 259, 212-213). Due to the frequent problems with Merrill's projects, Palmer increasingly lost confidence in Merrill's engineering abilities (Palmer Dep. 37-39; JA 267-268) (Palmer Aff. ¶ 2; JA 122).[2]

C. *Merrill's Termination*

On June 8, 2001, Palmer told Merrill that problems had been encountered with a motorcycle dynamometer Merrill designed (Merrill Dep. 521-522; JA 210). Palmer asked Merrill to follow him to the fabrication shop (Merrill Dep. 521; Merrill Dep. Ex. 45; JA 210; 254). Lying on a table in the shop were some of the parts Merrill had designed for the dynamometer (Merrill Dep. 522; Merrill Dep. Ex. 45; JA 210; 254). Al Preisner, Assembly Manager, pointed out that the parts could not be assembled as Merrill had drawn them (Merrill Dep. 521-522, 525, 360-361; JA 210, 211, 180). Merrill said "shit," realizing the parts would need reworking (Merrill Dep. 522, 525; Merrill Dep. Ex. 45; JA 210, 211; 254).

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2. When Merrill interviewed with BEPCO for a position as a mechanical project engineer in early 1997, he represented on his resume that he expected to graduate that fall from Kennedy-Western University with a bachelor's degree in mechanical engineering (Merrill 74, Merrill Dep. Ex. 1; JA 141; 216). As BEPCO later learned, however, Merrill actually had very little education in mechanical engineering, never completed any course work at Kennedy-Western University, and knew that he was not going to complete a degree program as he represented (Merrill Dep. 76-87; JA 299-302).

Preisner left the conversation, and Palmer then asked Merrill: "Why is *[sic]* there always mistakes on your jobs[?]" (Merrill Dep. Ex. 45; JA 254). Merrill said he had no control over the detailers and checkers upon whom he relied (Merrill Dep. Ex. 45; JA 254). Palmer said he thought the problem was that Merrill was "technically incompetent" and could not "draw worth a shit" (Merrill Dep. 522; Merrill Dep. Ex. 45; JA 210; 254). Merrill asked Palmer: "How would [you] know?" (Merrill Dep. 522; JA 210). Merrill told Palmer: "You are out of line" (Merrill Dep. Ex. 45; JA 254). Palmer said several times he was thinking of firing Merrill (Merrill Dep. 522; Merrill Dep. Ex. 45; JA 210; 254). Merrill told Palmer: "You won't get away with it" (Merrill Dep. 523; Merrill Dep. Ex. 45; JA 210; 254). Palmer then escorted Merrill to the Human Resources office and out of the building (Merrill Dep. Ex. 45; JA 254).

Palmer, the sole decision maker in Merrill's termination, explained the reasons for his decision as follows:

> I had issues in Engineering. I was tasked with all of Engineering, that includes quality. There's only two things you can do. Fix them or remove them. When he made it clear that he would not recognize he had issues, wouldn't work with me on those issues, wouldn't accept me as his boss, I was only left with that second option, and that was to remove him.

(Palmer Dep. 37; JA 267).

After Plaintiff was terminated, BEPCO did not replace him. During the summer and fall of 2001, the company terminated several employees in a workforce reduction. (Palmer Aff. ¶ 4; JA 123).

D. *Merrill's Alleged Disability*

Gailord Weeks, Ph.D., Merrill's counselor and psychological expert, testified that Merrill has difficulty interacting socially or interpersonally in that he tends to be withdrawn or isolated (Weeks Dep. 25; JA 283). But Merrill is able to interact socially to some degree, and "is very capable on the surface of forming relationships" (Weeks Dep. 24-25, 76; JA 283, 291). Dr. Weeks testified: "Dan does have social skills. I mean, they are limited in some ways, and particularly when it comes to more intimate personal relationships or friendships or whatever" (Weeks Dep. 76-77; JA 291). Dr. Weeks had no reason to believe that Merrill's social difficulties impaired his ability to function at work (Weeks Dep. 32; JA 285). Dr. Weeks associated the deficits in social interaction and eye contact with a mental disorder known as Asperger's Syndrome (Weeks Dep. 28-29, 49; JA 284, 287).

Dr. Weeks testified that Merrill's eye contact was "reasonably good" and that Merrill could present well in many settings (Weeks Dep. 35-36; JA 286). Dr. Weeks did not believe that Merrill, while at BEPCO, would have appeared to a lay person to have a mental disorder (Weeks Dep. 35-36; JA 286).

The following facts (from Merrill's own testimony) demonstrate that he is not substantially limited in his daily life by his alleged impairments:

- Merrill interacted daily with many people at BEPCO with whom he had "good" – even "great" – relationships, including one particular supervisor who was known for having conflicts with "a lot" of

employees (Merrill Dep. 30, 131-141, 156-157, 165-166, 210, 214; JA 131, 145-147, 149, 151, 157, 158).

- He teaches "a lot" of people how to fish, including friends and referrals, and took coworkers to his riverfront home to teach them how to fish (Merrill Dep. 62, 72-73, 211-212; JA 138, 141, 158).

- He had "friends" at other machine shops, and called on them for assistance when BEPCO had a high volume of work (Merrill Dep. 215; JA 159).

- Merrill was married three times, once for six years; his relationship with his first wife is "excellent"; he maintains a good social and personal relationship with his second wife; and he has social conversations with his third wife regarding visitation issues (Merrill Dep. 22, 25-27, 45; JA 129-131, 134).

- He has an "excellent" relationship with his son and step-son, and communicates regularly with his son by e-mail and the telephone (Merrill Dep. 25-27; JA 130-131).

- He can communicate, interact socially and conduct himself appropriately, except in unusually antagonistic circumstances, or when too many people are talking at the same time (Merrill Dep. 379, 381-384; JA 183-184).

- Merrill agrees with the statements in his 1999 employee appraisal that he was "an effective communicator" and "effective listener" who could "present his ideas orally and in writing," and that he

"works very well with others" (Merrill Dep. 219-220; Merrill Dep. Ex. 9; JA 160; 220).

- He held regular employment with a number of companies for eighteen years before his employment at BEPCO and has had responsibility for hiring and firing personnel (Merrill Dep. 39, 544; Merrill Dep. Ex. 1; JA 133, 215; 216).

- Merrill graduated from high school with a grade point average of 2.497 (Merrill Dep. 505-506; JA 206), and claims to have completed college level courses (Merrill Dep. 74-75; JA 141-142). He has completed computer training courses on Excel, CadKey and Desktop software programs; studied psychology, human development and patent law on his own; took a paralegal course; and continues to study advanced photography (Merrill Dep. 44, 46-48, 52-54, 59, 60-62, 506; JA 134-136, 138, 206; Pl.'s Resp. 1st Interrog. No. 4; JA 225).

- He owned a photography studio at one time and still interacts with people regarding his photography services (Merrill Dep. 59, 60-62; JA 138).

- While at BEPCO, he wrote: "I believe that I work with a mental intensity higher than most, which allows me to complete more assignments in a lesser amount of time. Through practice, I can mentally work on varied projects at the same time. (Physically work on one, mentally work on three or four.)" (Merrill Dep. 202; Merrill Dep. Ex. 6, JA 156; 218).

- He told people at BEPCO that he has genius-level intelligence and that he can envision machines and concepts in ways in which other people cannot (Merrill Dep. 183-184; Palmer Dep. 49-53; Roodvoets Dep. 71; JA 154; 269-270; 278).

- He is able to care for himself in all respects (Merrill Dep. 378; JA 183).

E. *Misstatements in Petitioner's Statement of the Case*

1. Petitioner states that he was employed by BEPCO for five years (Pet. 2). In fact, he was employed for four years, from May 19, 1997 to June 8, 2001 (Merrill Dep. 28, 93; JA 131; 303). He also claims that he "functioned successfully as a non-degreed engineer for Defendant" for a number of years (Pet. 2). This broad generalization is inconsistent with Petitioner's testimony (and the District Court's findings) regarding the problems with Petitioner's machine designs in 2001, described above.

2. Petitioner's description of the exchange leading up to his termination is materially incorrect due to selective omissions. Petitioner's description omits the undisputed fact that when he was shown the parts he had designed that could not be assembled he responded "shit," which was the first profanity uttered in the conversation (Merrill Dep. 522, 525; Merrill Dep. Ex. 45; JA 210, 211, 254). The Petition also fails to disclose that Petitioner asked Palmer "how would you know?", after Palmer said that Merrill was "technically incompetent" and could not "draw worth a shit" (Merrill Dep. 522; JA 210). Petitioner also failed to mention that when Palmer said that he was thinking of firing Merrill, Merrill responded "you won't get away with it" (Merrill Dep. 523;

Merrill Dep. Ex. 45; JA 210, 254). In summary, Petitioner's Statement of the Case belittles Palmer's conclusion that Petitioner was unwilling to take Palmer's direction and improve his performance, yet Petitioner omits the very statements that Petitioner undisputedly made that demonstrate the reason for Palmer's conclusion.

3. Petitioner states that BEPCO "fired him because of his disability" (Pet. 2). This is only Petitioner's contention, not a fact. Both the District Court and the Court of Appeals found that there was no evidence to support this contention.

4. Petitioner asserts that "Defendant BEPCO maintained that Plaintiff Merrill was fired for poor performance" (Pet. 6). On the contrary, Respondent has consistently stated and shown that Petitioner was fired because of his defiance of Palmer's supervisory authority and his refusal to recognize the need to improve his performance.

5. Petitioner states that "during the time of [his] termination, Defendant BEPCO laid off a number of other employees due to a reduction in force (RIF)" (Pet. 3). This statement is misleading, as it incorrectly suggests that a workforce reduction was a factor in Petitioner's dismissal, and that the layoff of other employees had already begun when Petitioner was discharged on June 8, 2001. Other BEPCO employees were laid off during the summer of 2001, after Petitioner's discharge (Palmer Aff. ¶ 4; DC Op 94; JA 117).

SUMMARY OF THE ARGUMENT

There is no compelling reason for this Court to consider and decide the questions presented by the Petition, for the following reasons:

1. Whether the *McDonnell Douglas* formula should be modified for cases involving a reduction in force ("RIF"): The Sixth Circuit's decision is not "in conflict with the decision of another United States court of appeals" on this question, Sup. Ct. R. 10(a), because the Sixth Circuit did not enter any decision on this question. Petitioner did not present this question to the Sixth Circuit, just as he did not raise the issue in the District Court. Second, the question is not presented on the facts of this case, because Petitioner was not discharged during or because of a RIF. Third, there is no meaningful split of authority among the Circuit Courts on this question.

2. Whether a disability must be the "sole" cause or only a "motivating" cause to establish a claim under the ADA: The Sixth Circuit's decision is not "in conflict with the decision of another United States court of appeals," Sup. Ct. R. 10(a), because the Sixth Circuit did not decide this issue. Because both the District Court and the Court of Appeals applied well-established principles in determining that there was neither circumstantial nor direct evidence of discriminatory intent, the question of whether the causation requirement is described as a "sole" or "motivation" cause test is not relevant to either court's decision.

3. Whether the ability to "interact with others" is a "major life activity" under ADA: This issue is not presented on the facts of this case, because Petitioner did

not make this allegation in his complaint, he did not present the question to the Sixth Circuit, and the Sixth Circuit did not decide it. As a result, the Sixth Circuit's decision is not "in conflict with the decision of another United States court of appeals" on this question. Sup. Ct. R. 10(a). Second, there are simply too few Circuit Court decisions on this issue to show a meaningful split of authority. Third, the undisputed facts (as found by the District Court without objection Petitioner on appeal) demonstrate that Petitioner is not "substantially limited" in the ability to "interact with others."

ARGUMENT

In his effort to obtain an audience with this Court, Petitioner has undertaken a wholesale restructuring of his case strategy. He asks this Court to consider two questions (the "RIF" standard and "interacting with others") that he never raised in the Sixth Circuit. One of those (the "RIF" question) he did not raise even in the District Court. The third issue is the semantic matter of the title to be given to a causation standard ("sole" versus "motivating" cause) which has played no role in the analysis or decisions of the District Court and the Court of Appeals.

Petitioner argues that that there are "splits of authority" among the Circuit Courts on the issues he presents, but scrutiny of the relevant decisions demonstrates that there is not. Ultimately, Petitioner's questions are not even presented on the facts of this case. There is no valid reason for this Court to grant the Petition.

I. THERE IS NO REASON FOR THIS COURT TO CONSIDER AND DECIDE WHETHER THE *MCDONNELL DOUGLAS* FORMULA SHOULD BE MODIFIED IN THE CONTEXT OF A REDUCTION IN FORCE.

A. *This Issue Is Not Properly Before This Court Because Petitioner Did Not Present It To The District Court Or The Court Of Appeals.*

Petitioner's suggestion that his burden of proof should have been modified because of a *reduction in force* never appears in the appeal brief, reply brief, or petition for rehearing that he filed in the Sixth Circuit. And he never advanced this notion in the District Court.

Perhaps in an effort to create the appearance that he raised the issue below, Petitioner presents the issue to this Court as follows:

> The Sixth Circuit affirmed the decision of the District Court, holding that Plaintiff Merrill's failure to satisfy the replacement prong of the *McDonnell Douglas* test was "fatal" to his case (App. 10a n.2), **even though the case involved a RIF in which employees are not normally replaced.** Notably, in his appeal brief, Plaintiff Merrill relied on several cases to support the application of a modified *McDonnell Douglas* test, including *Kline v. TVA*, 128 F.3d 337, 348-349 (6th Cir. 1997), *rehearing and suggestion for rehearing in banc denied*, 1998, (a plaintiff may establish discrimination either by introducing direct evidence of discrimination or by proving

> inferential and circumstantial evidence which would support an inference of discrimination) and *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1248 (6th Cir. 1995) ("a plaintiff may establish a prima facie case of discrimination either by presenting direct evidence of intentional discrimination by the defendant or by showing the existence of facts which create an inference of discrimination." (internal citations omitted)).

(Pet. 7-8; emphasis supplied). But neither the District Court nor the Sixth Circuit made any ruling about the effect of a RIF on the *McDonnell Douglas* test, because Petitioner never asked them to. Further, the "modified *McDonnell Douglas* test" that Merrill asked the Sixth Circuit to apply (and the *Kline* and *Talley* cases he cited to support it) had nothing to do with a reduction in force. Instead, what Petitioner asked the Sixth Circuit was to recognize a third method of inferring discriminatory intent – in addition to the "direct evidence" and *McDonnell Douglas* methods – a method Petitioner described as the "reasonable inference" theory (Pet. 9a-10a).

Petitioner's request to have this Court apply a RIF-adjusted *McDonnell Douglas* burden of proof is nothing more than a belated change in his strategy. It is not a protest of substantial error below, and this Court should not condone it.

B. *The Sixth Circuit's Decision Is Not Contrary To The Supreme Court's Decision In O'Connor v. Consolidated Coin Caterers Corp.*

Petitioner argues that the Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 310 (1996), is inconsistent with the Sixth Circuit's ruling that he could not present a *prima facie* case because he was

not replaced (Pet. 3, 12, 17, 25-26). To the contrary, *O'Connor* actually clarified the replacement requirement of *McDonnell Douglas*, thereby implicitly reaffirming it. Nothing this Court said in *O'Connor* decision is inconsistent with the Sixth Circuit's analysis or decision in this case.

The plaintiff in *O'Connor* was discharged when he was 56 years old, and was replaced by a 40 year-old. The Fourth Circuit held that O'Connor could not establish a prima facie case of age discrimination because his replacement was not *outside* the class protected by the Age Discrimination in Employment Act. The Supreme Court reversed, holding that O'Connor did not have to prove he was replaced by someone younger than 40 to establish a *prima facie* case. Whether the replacement was under age 40, the Court explained, had no logical connection to whether the plaintiff was a victim of age discrimination:

> The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*. Or to put the point more concretely, there can be no greater inference of *age* discrimination (as opposed to "40 or over" discrimination) when a 40 year-old is replaced by a 39 year-old than when a 56-year-old is replaced by a 40 year-old.

O'Connor, 517 U.S. at 312 (emphasis in original).

But contrary to Petitioner's insinuation, the *O'Connor* Court did not abandon the replacement element of the *McDonnell Douglas* test. The Court's conclusion actually reaffirmed the importance of that element:

> Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.

Id. at 313.

Petitioner argues that the replacement element cannot apply here under *O'Connor* because, in Petitioner's view, that element has no logical relationship to the question of whether there was disability discrimination. But *O'Connor* reaffirmed that the replacement element remains part of the *McDonnell Douglas* formula. It simply rejected the notion that age discrimination could not be inferred unless the replacement was less than 40 years of age. That analysis simply does not apply here. There is no reason why the replacement of a disabled employee by a non-disabled employee would not bear a logical relationship to the question of whether disability discrimination had taken place.

C. *There Is No Meaningful Circuit Split On Whether The McDonnell Douglas Standard May Be Modified To Account For The Unique Characteristics Of A Reduction In Force.*

Petitioner asserts that there is "a split of authority among the Circuit Courts of appeal" as to "whether the *McDonnell Douglas* test should be modified in the RIF context" (Pet. 3). This contention is groundless.

All of the federal Circuits Courts have considered the application of *McDonnell Douglas* in a case in which a discharge occurred in an employer's economically-motivated workforce reduction. Because employees terminated in a downsizing are rarely if ever "replaced," the circuits have recognized that it is generally impossible for a plaintiff to satisfy the fourth element of the *McDonnell Douglas* test, which requires a discharged plaintiff to show that he was replaced by someone outside the protected group. *There is no division among the circuits on this point.*[3] Different circuits have used slightly different words to describe their

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3. *See, e.g., Hidalgo v. Overseas Condado Insurance Agencies*, 120 F.3d 328 (1st Cir. 1997); *Montana v. First Federal Savings & Loan Association*, 869 F.2d 100 (2d Cir. 1989); *In Re: Carnegie Center Associates*, 129 F.3d 290 (3d Cir. 1997); *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993); *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1439 (1982); *Barnes v. GenCorp Inc.*, 896 F.2d 1457 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 211 (1990); *Bellaver v Quanex Corp.*, 200 F.3d 485 (7th Cir. 2000); *Holley v. Sanyo Manufacturing, Inc.* 771 F.2d 1161 (8th Cir. 1985); *Nesbit v. Pepsico Inc.*, 994 F.2d 703 (9th Cir. 1993); *Jones v. Unisys Corp.*, 54 F.3d 624 (10th Cir. 1995); *Earley v. Champion International Corp.*, 907 F.2d 1077 (11th Cir. 1990); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 343, (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 488 (1983).

adjustment of the standard in the RIF context.[4] But these are variations on the same theme, not inconsistent rules. They do not suggest that the Circuit Courts would reach substantially different results, and certainly do not reveal a division of authority that is crying out for resolution by this Court.

D. *A "RIF"-Based Burden of Proof Formula Would Not Apply On The Facts Of This Case, Because Petitioner Was Not Discharged As Part Of A Reduction In Force And The Reasons For Modifying The Standard Do Not Apply Here.*

Because Merrill was not discharged during or because of a reduction in force, the decisions which approve a modification to the *McDonnell Douglas* standard in the RIF setting do not apply here.

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4. To replace the replacement element of *McDonnell Douglas*, some Circuits have considered whether "younger persons were retained" in the reduction. *See, e.g., Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 343 (D.C. Cir.), *cert. denied*, 104 S. Ct. 488 (1983); *Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1111 (1st Cir. 1989); *Pena v. Brattleboro Retreat*, 702 F.2d 322, 324 (2d Cir. 1983). Other Circuits have required the plaintiff to produce "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *See, e.g., Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1439 (1982); *Nesbit v. Pepsico Inc.*, 994 F.2d 703 (9th Cir. 1993). Others have stated that the fourth element may be met by circumstantial evidence that a plaintiff was treated less favorably in a reduction than younger employees. *See, e.g., Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1454 (10th Cir. 1994); *Hebert, supra* at 1111.

As described in *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993), a reduction in force occurs "where a group of employees is discharged because of the company's economic conditions." Thus, in order to proceed under the Fourth Circuit's modified *prima facie* case formula, a RIF plaintiff must show that "he was selected for discharge from a larger group of candidates." *Id.* at 1315. The RIF model plainly does not fit the present case, because Merrill was not discharged "because of the company's economic conditions" and was not "selected for discharge from a larger group of candidates."

While all of the Circuit Courts have modified the *McDonnell Douglas* scheme in the RIF setting, they have not simply eliminated the "replacement" requirement. All have required some alternative evidentiary showing that would give rise to an inference of discrimination. For example, in *Mitchell*, the Fourth Circuit required the plaintiff to show that "he was performing at a level substantially equivalent to the lowest level of those of the group retained," *and* that the remaining work force contained "some unprotected persons who were performing at a lower level than that at which he was performing." *Id.* at 1315. The Third Circuit has expressed a slightly different but not inconsistent formulation, holding that a plaintiff in a RIF age discrimination case may establish a *prima facie* case by showing that the employer retained a "similarly situated" younger employee. *Anderson v. Consolidated Rail Corp.*, 297 F.3d 242, 250 (3d Cir. 2002).

Of the various RIF-based adjustments to *McDonnell Douglas*, Petitioner's evidence satisfies none of them. All of those variations require some measure of *evidence* – more than the mere fact that a protected class member was

discharged and not replaced – to support an inference that "the employer intended to discriminate in reaching the decision at issue." *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1439 (1982). But there is no such evidence in this case.

II. THERE IS NO REASON FOR THIS COURT TO DECIDE WHETHER A DISABILITY MUST BE THE "SOLE CAUSE" OR ONLY A "MOTIVATING CAUSE" IN ORDER TO ESTABLISH A DISCRIMINATION CLAIM, BECAUSE THE ISSUE MAKES NO DIFFERENCE IN THIS CASE AND THE SIXTH CIRCUIT DID NOT DECIDE IT.

Petitioner asks this Court to decide whether a disability must be the "sole" cause of his discharge, or only a "motivating" cause, to establish a claim under the ADA. Petitioner correctly observes that in prior decisions the Sixth Circuit has commented that a disability must be the "sole cause" of a discharge in order to establish a violation of ADA. *See, e.g., Walsh v. UPS*, 201 F.3d 718, 725 (6th Cir. 2000); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1177 (6th Cir. 1996). But this case presents no reason for the Court to consider whether that title is correct, because the issue could not possibly make any difference in the outcome of this case.

It is important to note that the Sixth Circuit did not decide this question, even though Merrill raised it in his brief to that Court. In analyzing whether Merrill's discharge was "caused" by his alleged disability, the Sixth Circuit used the widely-accepted method of analysis:

> A plaintiff may establish unlawful discrimination by introducing direct evidence of intentional

> discrimination, including evidence that the employer relied on the plaintiff's disability in making its employment decision. *See Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996). Where no direct evidence of discrimination exists, a plaintiff must proceed under the familiar burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817 (1973).

(Pet. 7a). In its analysis of Merrill's evidence, the court of appeals first evaluated and rejected his claim that there was direct evidence of disability discrimination. The court then commented that "Merrill admits that he cannot" establish a *prima facie* case of discrimination "because there is no evidence that he was replaced or that his position was held open" (Pet. 9a).

There is nothing about this analysis that would have been affected by the selective use of either a "sole cause" or "motivating cause" standard. The same analysis of whether there is direct evidence and circumstantial evidence is applied by courts that use the term "motivating factor" to describe the causation standard they apply. *See, e.g., Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). Consequently, it was utterly unnecessary for the Sixth Circuit to decide the issue, and it did not. While the District Court referred to the "sole cause" standard (Pet. 117a), the District Court likewise conducted its analysis using the same standards that are us for evaluating direct and circumstantial evidence

It is of no consequence to observe that other circuits say that a disability must be a "motivating cause" to establish an ADA violation. Whether or not that conceptual difference constitutes a "circuit split," the Sixth Circuit's decision in this case does not define a circuit split, because this decision is not

"in conflict with the decision of another United States court of appeals" as contemplated by Sup. Ct. R. 10(a). An opinion that does not decide an issue cannot be in conflict with another circuit on that issue. And a non-decision should not be reviewed on the premise of resolving a split that can only be found in cases that are not before the Court.

III. THERE IS NO REASON FOR THIS COURT TO DECIDE WHETHER "INTERACTING WITH OTHERS" IS A "MAJOR LIFE ACTIVITY" FOR PURPOSES OF THE ADA, BECAUSE THE ISSUE MAKES NO DIFFERENCE IN THIS CASE AND THE SIXTH CIRCUIT DID NOT DECIDE IT.

A. *Plaintiff Never Presented To The Sixth Circuit The Issue Of Whether Interacting With Others Is A Major Life Activity Under ADA, And The Sixth Circuit Never Decided It.*

The third question Petitioner submits represents another change in strategy. Petitioner never asked the Sixth Circuit to decide whether "interacting with others" is a major life activity under the ADA. The Sixth Circuit, of course, did not consider or decide it.

In introducing the issue for this Court's consideration, Petitioner emphasizes his disagreement with the *District Court's* treatment of the issue, but is conspicuously silent (as he must be) with regard to the Sixth Circuit's treatment of it:

> Another disputed issue in Defendant's Motion [for summary judgment] was whether Plaintiff Merrill's inability to interact with others substantially limited him in his ability to work. The District Court erroneously recast the ability to "interact with" others

> as the ability to "get along with" others. . . . The U.S. Magistrate Judge even analyzed a First Circuit opinion on this issue, but he ultimately failed to distinguish between the ability to "interact" with others and the ability to "get along with" others, concluding that: "Plaintiff's purported inability to get along with co-workers is not a 'major life activity' within the meaning of the ADA."

(Pet. 7).

Petitioner never presented the District Court or the Court of Appeals with what he presents here as an all-important distinction between the ability to "interact" with others and the ability to "get along" with others. His complaint did not allege that he was substantially limited in the major life activity of "interacting with others;" he did not identify the issue by evidence or argument in his brief in opposition to BEPCO's motion for summary judgment; and he made absolutely no mention of the "ability to interact with others" in his briefs to the Court of Appeals.

To the contrary, the entire focus of Merrill's contention in the Court of Appeals was that his ADA disability lay in the alleged limitation in his ability "to make eye contact" (Appellant's Br. 5, 13, 21, 23, 26-28; Appellant's Reply Br. 5, 7, 8). This point is crystallized by the following statement on page 28 of Appellant's Brief:

> Turning to the case at bar, the disabling criterion applied by Defendant was that Plaintiff make eye contact with his supervisor.

Petitioner's amended theory of disability is not an appropriate subject for review by this Court.

B. *There Is No Circuit Split On The Issue of Whether Interacting With Others Is A Major Life Activity.*

Petitioner asserts that there is "a split of authority among the Circuit Courts of appeal" as to "whether one's ability to interact with co-workers is a major life activity under the ADA" (Pet. 3). To the contrary, there is a substantial lack of authority on this point, and the scant opinions that address it did not demonstrate any genuine circuit split on this issue.

Petitioner urges, as shown above, that there is an important distinction between the activities of "interacting with others" and "getting along with others." The First Circuit held that the ability to "get along with co-workers" is *not* a major life activity. *Soileau v. Guilford of Maine*, 105 F.3d 12, 15 (1st Cir. 1997). But Petitioner would presumably contend that *Soileau* is not on point, because Petitioner now contends that his disability lies in "interacting with" rather than "getting along with" others. In that regard, only two Circuit Courts have reached the issue of whether "interacting with others" could be a major life activity, with both answering in the affirmative. *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 204 (2d Cir. 2004); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2689 (2000).

Curiously, Petitioner's statement that there is a "significant split of authority" appears in his Petition immediately after he highlights the *absence* of authority on the point, by reiterating the Second Circuit's observation in *Jacques* that the Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have noted the question but declined to decide it (Pet. 25). An absence of authority is not a split of authority. And two Circuit Court decisions, both answering

"yes" to whether "interacting with others" can be a major life activity, do not constitute a split of authority.

Because the Sixth Circuit did not decide the issue in this case, its decision is not in conflict with that of any other Circuit, and this is not an appropriate case to be considered on that basis under Sup. Ct. R. 10(a). To grant a writ of certiorari in a case in which the Circuit Court has not decided the issue, the Supreme Court would be deprived of the lower court's analysis of the issue and its examination of the case-specific evidence that may be relevant to it. To grant a writ when only two Circuits have ruled on an issue, the Court would be deprived of the developed body of legal thought that should emerge after thorough analysis by several panels of Circuit Courts in a wide variety of factual and procedural settings.

Because the law on this question is largely undeveloped in the District and Circuit Courts, and because the Sixth Circuit did not decide it in this case, there is no valid reason for this Court to consider it now.

C. *Whether Interacting With Others Is A Major Life Activity Is Of No Relevance To The Outcome Of This Case, Because Petitioner Did Not Appeal The District Court's Finding That He Is Not Substantially Limited In That Activity.*

The District Court found that Petitioner was not substantially limited in ability to interact with others (Pet. 92a – 94a), and Petitioner did not appeal that finding. With regard to a substantial limitation of a major life activity, his only contention on appeal was that he was limited in his ability to make eye contact. Therefore, even if this Court

were to consider whether "interacting with others" is a major life activity, the outcome of that decision could not affect the outcome of this case.

Observing that interacting with others "is essentially mechanical," the Second Circuit in *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 203 (2d Cir. 2004) described the degree of limitation required to establish an ADA disability:

> We hold that a plaintiff is "substantially limited" in "interacting with others" *when the mental or physical impairment severely limits the fundamental ability to communicate with others.* This standard is satisfied when the impairment severely limits the plaintiff's ability to connect with others, *i.e.*, to initiate contact with other people and respond to them, or to go among other people – at the most basic level of these activities. This standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is in appropriate, ineffective, or unsuccessful. A plaintiff who otherwise can perform the functions of a job with (or without) reasonable accommodation could satisfy this standard by demonstrating isolation resulting from any of a number of severe conditions, including acute or profound cases of: autism, agoraphobia, depression or other conditions that we need not try to anticipate today.

386 F.3d at 203 (emphasis added). Petitioner's evidence falls far short of this standard. The undisputed facts show that he certainly possessed the "fundamental ability to communicate with others" and could "initiate contact with other people and respond to them." As a result, whether the Supreme Court

decided that "interacting with others" is or is not a "major life activity" under ADA, the outcome of this case would not change. A writ of certiorari on this question is unwarranted.

IV. THIS CASE DOES NOT HAVE NATIONAL IMPORTANCE THAT WOULD WARRANT SUPREME COURT REVIEW.

This case has been very important to the parties, and it has consumed the time and resources of the parties, the District Court and the Sixth Circuit in full measure. Without denigrating that importance, the candid truth is that it is not a case with profound jurisprudential importance within or beyond the Sixth Circuit. In particular, Petitioner's prediction that denial of his Petition will inflict dire consequence on persons with disabilities in the Sixth Circuit is wholly unfounded. His specious argument betrays a severe misunderstanding of what the Sixth Circuit decided.

First, Petitioner predicts that "[i]f the Sixth Circuit's precedent stands, no individual with a qualifying disability who was fired during a RIF and who does not have direct evidence of discrimination will be able to sustain a prima facie claim of discrimination under the ADA" (Pet. 27). It is absolutely certain that the Sixth Circuit's decision in this case will *not* have that effect. It will never even be cited in argument over the burden of proof for an ADA plaintiff who is discharged in a RIF, because the Sixth Circuit did not decide *anything* about that question. If there is Sixth Circuit "precedent" on this issue, as Petitioner suggests, it is not found in its opinion below.

Second, Petitioner threatens that "if an individual within the jurisdiction of the Sixth Circuit suffers from a disability that includes an inability to interact with co-workers – as Plaintiff Merrill in the case at bar – such an individual will not be deemed

qualified to sustain a claim for discrimination under the ADA within the bounds of the Sixth Circuit Court of Appeals" (Pet. 28). Once again, Petitioner imagines that the Sixth Circuit decided something that it did not. Someday the Sixth Circuit may decide whether the "interacting with others" is a major life activity under ADA, and what it means to be "substantially limited" in that activity. But it was not presented with that question in this case, and its opinion below cannot possibly be read to reflect a view on it. The Court expressly stated that it was *not* addressing the issue of whether Merrill "was 'disabled' within the meaning of the ADA," which subsumes any issue of whether Merrill was "substantially limited" in any major life activity.

The Sixth Circuit left these issues open to be explored and developed by the District Courts and Circuit Courts in future cases, as they should be. The Supreme Court should do the same.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 05-1565

In the Supreme Court of the United States

DANIEL LEE MERRILL, SR.,
Petitioner,

v.

BURKE E. PORTER MACHINERY COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Respondent has provided no persuasive reason for this Court to leave unreviewed the Sixth Circuit Court of Appeal's decision in this case. As explained below, and as exhaustively reviewed in the petition for a writ of certiorari, the Sixth Circuit's decision is wholly inconsistent with its sister Circuits on a variety of critical legal issues, including issues arising under this Court's *McDonnell Douglas* test and under the American's with Disabilities Act (ADA). Respondent's attempt to distort the underlying record and to dismiss the nature of the split of authority on these legal issues is unavailing and should not dissuade this honorable Court from issuing a writ of certiorari.

In keeping with its obligations, Petitioner will limit his Reply to only the new points raised in Respondent's Opposition Brief.[1] Petitioner will address such new points below and in the following order: (1) jurisdiction; (2) the *McDonnell Douglas* burden-shifting test; (3) the standard of causation in ADA cases: and (4) "interacting with others" as a major life activity under the ADA.

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[1] Petitioner notes for the record that Respondent's Counter-Statement of Facts contains numerous inaccuracies and misstatements. Inasmuch as the District Court issued exhaustive findings of fact in this case, which were summarized by the Sixth Circuit, and for purposes of the petition, Petitioner will rely upon the facts adduced by the District Court (App. 15a–63a) and recited by the Sixth Circuit (App. 4a–6a) rather than outline each such inaccuracy.

ARGUMENT

I. JURISDICTION

An overarching theme proffered by Respondent is that this Court lacks jurisdiction to hear this case. Specifically, Respondent argues that none of the issues raised by Petitioner are "in conflict with the decision of another United States Court of Appeals" pursuant to S. Ct. R. 10(a) and, further, that such issues were neither raised with nor decided by the Sixth Circuit. (Opp. 13-14). Therefore, according to Respondent, the issues are not a proper subject for review. But, this is not true. The issues *were*, in fact, raised by Petitioner; yet, the Sixth Circuit either chose to ignore such arguments or summarily dismissed them, as will be discussed in more detail below.

A. The Modified *McDonnell Douglas* Issue Was Raised and Addressed Below.

The first issue raised by Petitioner is the split of authority on a modified *McDonnell Douglas* test involving a discriminatory discharge during a RIF. As the record shows, *both* Petitioner and Respondent repeatedly asserted in their briefing that Petitioner's employment was terminated on June 8, 2001, that Petitioner was not replaced, and that Respondent reduced its workforce during the summer and fall of 2001. Indeed, the District Court expressly held: "Plaintiff was not replaced following his termination. During the summer and fall of 2001, other BEPCO employees were let go as part of a reduction in force." (App. 63a). Respondent now takes the position that Petitioner never argued that "his burden of proof should have been modified because of a reduction in force." (Opp. 15). This statement, however, is directly contradicted by the record. In his Brief on Appeal to the Sixth Circuit, Mr. Merrill expressly argued that the *McDonnell Douglas* test should be modified to allow him to provide evidence to

support a reasonable inference of discrimination. (Plaintiff's Brief on Appeal, at 20-21). Moreover, and as Respondent's counsel well knows, Petitioner and Respondent thoroughly argued the issue of whether the *McDonnell Douglas* test should be modified due to the RIF circumstances during Oral Argument before the Sixth Circuit Court of Appeals. (Affidavit of Robert E. Eleveld ("Eleveld Aff."), ¶¶ 1-3, App. 125a). Unfortunately, Petitioner cannot submit a copy of that hearing transcript to this Court because the Sixth Circuit Court of Appeals destroyed that recording before the end of the 90-day window for filing the petition for writ of certiorari. (Eleveld Aff., ¶ 4, App. 125a). Thus, such a transcript is no longer available to the parties or this Court.

In any event, Petitioner did in fact argue before the Sixth Circuit that a modified *McDonnell Douglas* test should be applied in cases involving discriminatory discharge during a RIF. However, the Sixth Circuit did not apply a modified *McDonnell Douglas* test, a decision that exacerbates the conflict among the circuits about the proper application of the *McDonnell Douglas* test in RIFs. This issue is, therefore, ripe for appeal.

B. The "Sole" versus "Motivating Cause" Issue Was Raised and Addressed Below.

Respondent also argues that, although Petitioner briefed and argued the "sole cause" issue before the Sixth Circuit, the Sixth Circuit did not rule on the issue, and, therefore, it is unnecessary for this Court to consider it. (Opp. 22-24). According to Respondent, the Sixth Circuit's refusal to opine upon this issue did not create a further split among its sister courts and, therefore, its decision is not "in conflict" with another United States Court of Appeals for purposes of Sup. Ct. R. 10(a). As this Court may recall, the *only* reason why the Sixth Circuit did not opine upon the "sole cause" issue is because it had already (and erroneously) concluded that

Petitioner's inability to show he was replaced under the "replacement prong" of the *McDonnell Douglas* test was "fatal" to his case. (App., 10a, n.2). If the Sixth Circuit had *properly* applied a modified *McDonnell Douglas* test, the "sole cause" issue would have been decided, thus making it highly relevant to this case.

Further, the District Court in this case expressly ruled that Mr. Merrill must prove that "he was discharged ***solely*** by reason of his handicap." (App. 117a, emphasis added). By refusing to opine upon Petitioner's arguments on causation, and by not reversing the District Court on this issue, the Sixth Circuit tacitly upheld the District Court's determination that the proper causation standard is a "sole" cause standard rather than a "motivating cause" standard, a decision that is directly in conflict with the Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits. (Pet. 18-22). It is not accurate, therefore, to say that the Sixth Circuit did not address the causation issue; it addressed it by dismissing it without the benefit of discussing its merits, leaving the law of the case in direct conflict with its sister circuits. For all of these reasons, and for those elucidated in pages 18-22 of his Petition, Mr. Merrill respectfully submits that the standards contemplated by Sup. Ct. R. 10(a) are amply satisfied and the causation standard in ADA cases is ripe for review.

C. The "Interacting with Others" as a Major Life Activity Issue Was Raised and Addressed Below.

Respondent also argues that this Court need not consider whether "interacting with others is a major life activity" because the Sixth Circuit decided not to address this issue (Opp. 24) and, further, that Petitioner never presented to the lower courts the distinction between the ability to "interact with others" and the ability to "get along with others." (Opp. 25). However, the issue presented by Mr. Merrill in his Petition is this: "whether a plaintiff's ability to 'interact with'

co-workers constitutes a 'major life activity' for purposes of sustaining a claim under the ADA." It is not to create a body of law over the distinction between the ability to "interact" and the ability to "get along" with others. Moreover, and as is evident by his Sixth Circuit Brief on Appeal, Mr. Merrill specifically asked that court to address whether his ability to "work" was substantially limited based on Respondent's activities, and, ultimately whether he is "disabled" for purposes of the ADA.[2]

Additionally, and as with the causation standard, the Sixth Circuit refused to reach the issue of whether Mr. Merrill was "disabled" within the meaning of the ADA because it had already decided that his failure to satisfy the "replacement prong" of his prima facie case was "fatal" to his claim. Specifically, the Sixth Circuit held: "***Though the parties vigorously dispute whether Merrill was 'disabled' within the meaning of the ADA***, his failure to satisfy the fifth prong of the prima facie case is fatal." (App. 10a, n. 2, emphasis added).

It is important to note that it was Respondent who first pointed out to the District Court that a split of authority exists among the Circuits on whether "interacting with others" is a major life activity. In its Brief in Support of its Motion for Summary Judgment, Respondent stated:

> The federal circuit courts are split as to whether "interacting with others" is a major life activity for

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[2] Petitioner directs this Court's attention to the opinion of the District Court , in which the Magistrate Judge analyzed whether "work" was a major life activity. (Pet. App. 81a-85a). In that analysis, the Magistrate Judge stated that, of the two aspects involved in the ability to perform work, the first aspect was "the ability to get along with co-workers." (Pet. App. 83a).

> ADA purposes. *Compare Solieau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997)(ability to get along with others not a major life activity) with *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234-35 (9th Cir. 1999)(social interaction possibly could be major life activity). In *MX Group, Inc. v. City of Covington,* 293 F.3d 326, 337 (6th Cir. 2002), the Sixth Circuit mentioned the *McAlindin* decision in dicta, but did not explicitly adopt its holding that social interaction is a major life activity.

(Defendant's Brief in Support of Motion for Summary Judgment, at 17, n.6). Now, Respondent takes the exact *opposite* position and argues that there is *no* circuit split on the issue of whether interacting with others is a major life activity. (Opp. 26). Respondent should not be permitted to take an alternate legal position on this issue simply in an effort to avoid review in this case. For all of these reasons, Mr. Merrill's Petition should not be dismissed for want of jurisdiction.

II. THE MODIFIED *MCDONNELL DOUGLAS* TEST.

Turning now to the substantive aspects of Respondent's Opposition, Respondent raises a number of arguments in response to the first issue in Mr. Merrill's Petition. First, Respondent argues that the Sixth Circuit's opinion does not conflict with this Court's decision in *O'Connor v. Consolidated Coin Caterer's Corp.*, 517 U.S. 308 (1996). (Opp. 16-17). Respondent argues that *O'Connor* actually reaffirms the "replacement requirement" of the *McDonnell Douglas* test. However, in taking this position, Respondent ignores this Court's holding in that case that: "Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case." *Id.* at 310. It is precisely because the Sixth Circuit failed to

modify the replacement prong of the *McDonnell Douglas* test, as the *O'Connor* Court suggests doing when such a prong is entirely irrelevant in certain circumstances, that Mr. Merrill has filed this Petition.[3]

Second, Respondent argues that no split exists because "[t]here is no division among the circuits" on whether a modified *McDonnell Douglas* test should be used in RIF cases. (Opp. 19). Respondent submits that while the federal Circuit Courts have used "slightly different words to describe their adjustment of the standard in the RIF context" the differences all amount to "variations on the same theme," namely, a modified test for RIFs. (Opp. 20).

This argument is unavailing because it discounts the critical **substantive** differences among the circuits in the application of a modified *McDonnell Douglas* test. In fact, as is evidenced by footnote 4 of Respondent's Opposition Brief,

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[3] As is evident from his Petition, Petitioner asserts that *O'Connor* refutes rather than reaffirms that element. It is important to note that Respondent seems to take conflicting view points in its Brief. On the one hand, Respondent argues that the replacement prong is not reliable as an indicator of discrimination. (Opp. 19). But in a prior section of its brief, Respondent argues that there is "no reason why the replacement of a disabled employee by a non-disabled employee would not bear a logical relationship to the question of whether disability discrimination had taken place." (Opp. 18). Petitioner asserts that there are several reasons that there is no logical connection between the replacement element and the discrimination. The first being that in a RIF, as Respondent concedes, employees that are terminated are "rarely if ever 'replaced'." Further, there is no probative value in the replacement prong in this case and this Court has already found that the replacement prong is less reliable in determining discrimination, especially when the employee is not replaced by someone outside of his protected class.

it is apparent that the circuits do in fact apply substantively different standards under a modified *McDonnell Douglas* test, a fact Petitioner pointed out on pages 10-18 of the Petition. Moreover, Respondent's argument ignores the fact that the Sixth Circuit, *in this case*, refused to apply a modified test, even though Petitioner specifically argued for a modified test in the RIF context before the court. (Eleveld Aff., ¶¶ 1-3).

Third, Respondent argues that a modified *McDonnell Douglas* test does not apply in this case because Mr. Merrill was not discharged during a RIF. This is just not true. The District Court held that Mr. Merrill was not replaced after his termination in June 2001, and further, that Defendant let other employees go due to a reduction in force throughout the summer and fall of 2001. (App. 63a). While Respondent's factual assertion is erroneous, it is still irrelevant because the RIF test relied upon by Respondent (which requires that an employee be selected from a larger group), is a Fourth Circuit test, one which is not binding on the Sixth Circuit or on this Court.

Fourth, Respondent asserts that to prove discrimination under a RIF-modified *McDonnell Douglas* test, the evidence must "support an inference" of discrimination. (Opp. 21-22). Petitioner agrees with this assertion and also submits that he proffered sufficient facts in support of a reasonable inference of discrimination. The Sixth Circuit, however, concluded that reasonable inference of discrimination is not enough to preclude summary judgment in Respondent's favor and that to hold otherwise would contradict prior Sixth Circuit precedent. (App. 9a-10a). Because the Sixth Circuit has obviated potential discrimination claims on the basis of a reasonable inference, in direct contravention to its sister circuits, its decision in this case should be reviewed.

III. THE STANDARD FOR CAUSATION

Respondent concedes that the Sixth Circuit applies a "sole" cause standard in ADA cases, a standard that conflicts with its sister circuits (Opp. 14). Respondent argues, however, that the question is merely "the semantic matter of the title to be given to a causation standard ('sole' versus 'motivating' cause)." (Opp. 14). However, as is evident by the wealth of case law discussing the difference between a "sole cause" standard of causation and a "motivating cause" standard, the question is not one of mere semantics. Indeed, the terms are not interchangeable.

Respondent further argues that the resolution of the sole versus motivating cause issue would make no difference in this case. (Opp. 22). Respondent believes that it was not and is not necessary to determine a causation standard because no evidence supports Petitioner's discrimination claim. (Opp. 22-23). Respondent asserts that because the lower courts found no direct or circumstantial evidence, the causation standard does not matter. This is not true. The Sixth Circuit clearly held that certain reasonable inferences *could* be drawn from the facts of this case, but that reasonable inferences of discrimination were not enough to support a claim of discrimination and that a contrary ruling would contradict prior Sixth Circuit law. Petitioner asserts that the causation standard *is* relevant because there is evidence that supports a reasonable inference of discrimination in the case at bar. Further, Respondent has already asserted that evidence needed to support an inference of discrimination is the appropriate analysis when a RIF-based *McDonnell Douglas* test is applied and the Sixth Circuit has found such an inference could be found. (Opp. 22; App. 9a-10a). For these reasons, the issue of whether a sole cause or motivating cause standard of causation should apply in ADA cases is most certainly ripe for appeal, and most clearly in this case.

IV. INTERACTING WITH OTHERS AS A MAJOR LIFE ACTIVITY

The crux of Respondent's argument on this issue is that there is no circuit split on whether "***interacting with others***" is a major life activity. (Opp. 26). This position is directly contrary to the position Respondent took in its summary judgment briefing before the District Court, briefing in which Respondent specifically pointed out that "[t]he federal circuits are split as to whether 'interacting with others' is a major life activity for ADA purposes." (Defendant's Brief in Support of Summary Judgment, at 17, n.6). In light of its prior arguments, Respondent is now estopped from asserting that no such split exists.

Respondent also argues that "the District Court found that Petitioner was not substantially limited in ability to interact with others." (Opp. 27). However, the District Court, in granting Defendant's Motion for Summary Judgment, held that Petitioner's inability to "***get along with***" co-workers is not a "major life activity" within the meaning of the ADA. (App. 85a). That both the Court and Respondent use the language interchangeably further supports Petitioner's assertion that confusion exists about the distinction between the two. Thus, a significant split remains among the Circuit Courts on this issue.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: July 19, 2006

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APPENDIX D

AFFIDAVIT OF ROBERT J. ELEVELD

NOW COMES Robert J. Eleveld, the attorney for Petitioner in the matter of *Daniel Lee Merrill, Sr. vs. Burke E. Porter Machinery Company,* in the Supreme Court of the United States, Case No: 05-1565, and swears and affirms as follows:

1. I am counsel of record for Petitioner. I presented the Oral Argument on behalf of Petitioner before the Sixth Circuit Court of Appeals in this matter.

2. During that Oral Argument, I raised and argued at some length the question of whether it is appropriate to apply and/or modify the "replacement" prong of the *McDonnell Douglas* burden-shifting test during an economic downturn and specifically when the company that discharged the employee was undergoing a reduction in force (RIF).

3. I can attest that counsel of record for Respondent articulated counter-arguments against a modified *McDonnell Douglas* test in the RIF context during Oral Argument before the Sixth Circuit, to which I responded during my allotted rebuttal time.

4. Petitioner requested a copy and/or transcript of the recorded Oral Argument in this matter from the Sixth Circuit Court of Appeals and was advised by the Clerk of the Court that the transcription of that argument had been destroyed

prior to the completion of the 90-day period for the filing of a petition for writ of certiorari.

FURTHER, AFFIANT SAITH NOT.

Dated: 7/18/06 /s/_____
Robert J. Eleveld
Attorney for Petitioner

Subscribed and sworn to before me
on this **18th day of July 2006**.

/s/_____
Notary Public
Kent County, Michigan
My Commission expires June 3, 2001.

(4)

No. 05-1565

FILED
OCT 27 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

DANIEL LEE MERRILL, SR.,
Petitioner,

v.

BURKE E. PORTER MACHINERY COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Supreme Court Rule 44, Petitioner Daniel Merrill ("Mr. Merrill") respectfully petitions the Court for rehearing of its judgment and decision issued on October 2, 2006. Mr. Merrill makes this request because eight additional RIF cases have been decided in the Sixth Circuit since Mr. Merrill filed his Petition for Writ, cases that directly contradict the standard applied in Mr. Merrill's suit. In all of these new cases, the Sixth Circuit applied a modified *McDonnell Douglas* test; a test that Mr. Merrill submits should have been applied by the District Court for the Western District of Michigan and the Sixth Circuit Court of Appeals instead of the rigid *McDonnell Douglas* test actually applied.

Mr. Merrill's Petition for Rehearing is not meant to reargue that which is in the Petition for a Writ of Certiorari denied on October 2, 2006. Instead, these new cases evidence a change in the law of the Sixth Circuit, a change that occurred during the pendency of Mr. Merrill's appeal and a change that should be applied to his case. At the very least, these new cases underscore the need for clarification and crystallization of the standard to be applied in discriminatory discharge cases involving RIFs. The change in the law is important enough in its own right to warrant reconsideration of this Court's prior ruling.

BRIEF STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case involves an individual, Petitioner Daniel Merrill ("Petitioner Merrill") who was discriminatorily terminated from his position by his employer, Burke E. Porter Machinery Co. ("BEPCO") because he suffers from a disability known as Asperger's syndrome. Notably, during the time Petitioner Merrill was improperly terminated because

of his disability, BEPCO laid off a number of other employees due to a reduction in workforce (RIF). Because of that RIF, no replacement was hired to fill Plaintiff Merrill's position. As such, he was obviously unable to prove his prima facie case under a rigid application of the *McDonnell Douglas* test which required that Mr. Merrill actually show that he was replaced by someone who was not in his protected class.

Importantly, both the U.S. District Court for the Western District of Michigan (U.S. Magistrate Judge Joseph G. Scoville) and the Sixth Circuit Court of Appeals strictly construed this Court's seminal *McDonnell Douglas* test to require that Petitioner Merrill actually show that he was replaced by someone. The District Court applied the *McDonnell Douglas* burden-shifting framework, holding that a prima facie case of discrimination under applicable Sixth Circuit law required that a plaintiff prove that "the disabled individual was replaced." (Petition for Writ App. "App.") 119a). Again, because undisputed evidence existed that he was never replaced, the District Court determined that Plaintiff Merrill could not sustain a prima facie case of discrimination. (App. 119a-120a), relying on *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1185 (6th Cir. 1996). The Sixth Circuit affirmed the decision of the District Court, holding that Plaintiff Merrill's failure to satisfy the replacement prong of the *McDonnell Douglas* test was fatal to his case (App. 10a n.2), even though the case involved a RIF in which employees are not normally replaced. Each court specifically held that Mr. Merrill must show he was replaced regardless of the fact that he was terminated during a reduction in workforce situation.

Moreover, since Mr. Merrill first filed his Petition for Writ on June 6, 2006, the Sixth Circuit Court of Appeals and its lower courts decided eight cases that directly conflict with

the rigid application of the *McDonnell Douglas* test that was applied in Mr, Merrill's case. Four cases were decided by the Sixth Circuit Court of Appeals itself: (1) *Bender v. Hecht's Dep't Stores*, 455 F.3d 612 (6th Cir. *decided* August 1, 2006); (2) *Suits v. The Heil Co.*, 2006 U.S. App. LEXIS 20146 (6th Cir. *decided* August 3, 2006); (3) *Smith v. Allstate Ins. Co.*, 2006 U.S. App. LEXIS 21161 (6th Cir. *decided* August 16, 2006); and (4) *Wu v. Tyson Foods, Inc.*, 2006 U.S. App. LEXIS 16274 (6th Cir. *decided* June 22, 2006).

Four more cases were decided by the district courts of the Sixth Circuit, including a case that applied a modified *McDonnell Douglas* test in a ADA discharge involving a RIF: (1) *Skelton v. Sara Lee Corp.*, 2006 U.S. Dist. LEXIS 52482, 9-11 (S.D. Ohio *decided* July 31, 2006); (2) *Schirmer v. Enerfab, Inc.*, 2006 U.S. Dist. LEXIS 64344, 13-14 (S.D. Ohio *decided* September 8, 2006); (3) *Craig v. Cont'l Pet Techs., Inc.*, 2006 U.S. Dist. LEXIS 70287, 19-20 (E.D. Ky. *decided* September 26, 2006); and (4) *Vehar v. Cole Vision Corp.*, 2006 U.S. Dist. LEXIS 72978 (N.D. Ohio *decided* October 5, 2006). This is a significant number of cases to have been decided in one Circuit in a mere five months. More importantly, these cases, when compared to the hodgepodge of Sixth Circuit cases that previously addressed this issue, make it apparent that the Sixth Circuit is still confused about the proper standard to apply in RIF situations involving discriminatory discharges. It further suggests that a change in law may have occurred during the pendency of Mr. Merrill's appeal, a change that should rightfully apply to Mr. Merrill's suit.

ARGUMENT

The holdings by the District Court for the Western District of Michigan and by the Sixth Circuit Court of Appeals are in direct conflict with the standards applied in many of the cases decided after Mr. Merrill's case, cases in which the courts recognized the need for clarity on the proper application of the *McDonnell Douglas* test in RIFs. This Petition for Rehearing should be granted to provide the critical clarification obviously needed within the Sixth Circuit on the proper application of the burden-shifting analysis for discriminatory discharge cases.

On four occasions since June 6, 2006, the Sixth Circuit has addressed a modified *McDonnell Douglas* test in a RIF situation. While none of these cases are ADA cases, they all involved discriminatory discharges during a RIF. Moreover, all eight cases decided in the Sixth Circuit after June 6, 2006, have applied a modified *McDonnell Douglas* test.[1] This clearly shows a change in the law applied by the Sixth Circuit in RIF situations since Petitioner Merrill's case was decided.

Right after Mr. Merrill filed his Petition for Writ of Certiorari, the Sixth Circuit Court of Appeals in *Wu v. Tyson Foods, Inc.*, 2006 U.S. App. LEXIS 16274 (*decided* June 22, 2006) (unpublished), held that to meet the *McDonnell Douglas* test in a Title VII race discrimination RIF case a modified version could be proved. The Sixth Circuit applied the *Mc Donnell Douglas* test, opining that the plaintiff had to at least prove the "modified" version of the fourth prong.[2]

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[1] In *Suits v. The Heil Co.*, 2006 U.S. App. LEXIS 20146, the court only applied a modified *McDonnell Douglas* test because it desired to give the plaintiff the benefit of the doubt in light of the lack of clear precedent on this issue.

[2] The Fourth prong of the *McDonnell Douglas* test is commonly referred to as the replacement prong.

The *Wu* court decided that under the fourth prong of the burden-shifting test the plaintiff had to show that his "position remained open" after his discharge or, at a minimum that he was singled out "for discharge for impermissible reasons." The court cited *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 371 (6th Cir. 1999), "explaining that the fourth prong of the prima facie case is modified when the employee is dismissed due to a reduction-in-force 'because in a reduction-of-force situation the plaintiff is not in fact replaced.'" *Wu*, at *16.

Just over a month later, the Sixth Circuit (in a published case) modified the fourth prong of the *McDonnell Douglas* test in *Bender v. Hecht's Dep't Stores*, 455 F.3d 612 (6th Cir. *decided* August 1, 2006). The *Bender* court considered a claim under the ADEA for discriminatory discharge that occurred during a RIF. The court held that a plaintiff must satisfy the familiar burden-shifting framework set out in *McDonnell Douglas* ***as modified for workforce-reduction cases.*** The court stated that "[i]n 'reduction in force' cases like this one, the fourth prong [of the *McDonnell Douglas* test] is modified so that the plaintiffs must provide 'additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.'" *Id.* at 620 (citing *Rowan v. Lockheed Martin Energy Sys.*, 360 F.3d 544 (6th Cir. 2004)).

Two days later, the Sixth Circuit Court of Appeals again applied the *McDonnell Douglas* test, this time in a Title VII sex discrimination case involving a RIF. *Suits v. The Heil Co.*, 2006 U.S. App. LEXIS 20146 (*decided* August 3, 2006) (unpublished). The *Suits* court expressly acknowledged that the application of the fourth prong of the *McDonnell Douglas* test was unclear in this context. Thus, it decided to merely adopt the district court's approach in the case because it was

reasonable. The district court's approach was a type of modified fourth prong of the *McDonnell Douglas* test, about which the Sixth Circuit commented as follows:

> . . . the content of this fourth prong in RIF cases is not wholly clear. In order to give the plaintiff the benefit of the doubt in the absence of clear direction from precedent, the district court found that 'Plaintiff's direct evidence of discrimination (i.e. Nehrkorn's two sets of lunch comments) is sufficient to satisfy the fourth prong of her prima facie case.' Perhaps by way of explanation of its favoring the plaintiff in this particular, the court cited *Burdine* at 253 for the proposition that the 'burden of establishing a prima facie case of disparate treatment is not onerous.' We decline to rule that evidence (e.g., the lunchtime comments) that failed to satisfy the direct evidence requirement in employment discrimination cases will necessarily or even usually satisfy the fourth prong of the circumstantial evidence analysis.

That the Court of Appeals thought there was neither Sixth Circuit precedent nor Supreme Court precedent is a testament to the confusion about the proper application of the law in RIF cases. It is also a testament to a change in law during the pendency of Mr. Merrill's appeal, a change of law that should rightly change the outcome of Mr. Merrill's suit.

Fourteen days later, in *Smith v. Allstate Ins. Co.*, 2006 U.S. App. LEXIS 21161, (*decided* August 16, 2006) (unpublished), the Sixth Circuit Court of Appeals applied the *McDonnell Douglas* burden shifting test in a Title VII and ADEA case involving a RIF. This time the Sixth Circuit more clearly adopted a modified test in a RIF situation by stating that, "in RIF cases the fourth prong is modified to require the plaintiff to show that the employer singled her out for

discharge for impermissible reasons, as the employee is not "replaced" after a RIF." *Id.* at *14 (citing *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990) and *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir. 1998)). Notably, the *Smith* court Appeals did not merely adopt the standards of the district court but enunciated its own reasons for adopting the modified test. This decision evidences not only a recent change in direction of the law (a change that occurred during the pendency of Mr. Merrill's appeal), but it also amplifies the conflict in the Sixth Circuit on this issue under prior decisional law.

Beyond the four cases already cited in which the Sixth Circuit Court of Appeals applied a modified *McDonnell Douglas* test in a reduction in workforce situation, four district courts in the Sixth Circuit entered rulings on whether a modified test should be applied in the RIF context. In each case, the court held that a modified *McDonnell Douglas* test should be used in situations involving a discriminatory discharge during a RIF. For example, in *Skelton v. Sara Lee Corp.*, 2006 U.S. Dist. LEXIS 52482 (S.D. Ohio *decided* July 31, 2006), the District Court for the Southern District of Ohio held that a modified *McDonnell Douglas* test should be applied in ADEA cases involving RIFs. The *Skelton* court determined that when an employee is terminated during a RIF, the fourth prong of the McDonnell Douglas test is changed. *Id.*, at *10 (citing *Barnes*, 896 F.2d at 1465, n.1). The *Skelton* court reasoned that "the fourth element is modified because the employer does not replace the employee." *Id.* at *10 (citing *Godfredson*, 173 F.3d at 371). The court instead modified the fourth prong to require the plaintiff to show "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out [the plaintiff] for discharge for impermissible

reasons." *Id.*, at *10-11 (citing *Godfredson*, 173 F.3d at 371 and *Barnes*, 896 F.2d at 1465).

On September 8, 2006 the District Court for the Southern District of Ohio applied a modified *McDonnell Douglas* test in an ADA RIF case, which is precisely the same type of case at bar. *See Schirmer v. Enerfab, Inc.*, 2006 U.S. Dist. LEXIS 64344 (S.D. Ohio 2006). This court's decision directly contradicts the standard applied by its sister court in the case at bar. The *Schirmer* court explained that, under the *McDonnell Douglas,* analysis the plaintiff did not have to show she was replaced, but rather that "additional direct, circumstantial, or statistical evidence tending to indicate that [the employer] singled out [the employee] for discharge because of her disability. *Id.*, at *13 (citing *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996) and *Kvintus v. R.L. Polk & Co.*, 194 F.3d 1313 (6th Cir. 1999)). The *Schirmer* court reasoned that the employee's position was eliminated through an organizational restructuring, her job functions continued to be performed by other existing personnel, and the employee would be unable to demonstrate the traditional replacement prong because it had previously been found by the Sixth Circuit Court of appeals that "a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work." *Id.* (citing *Barnes*, 896 F.2d at 1465). The court held that in such situations, "the plaintiff may substitute 'additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.'" *Id.* (citing *Kvintus*, 194 F.3d 1313).

In late September, the District Court for the Eastern District of Kentucky in *Craig v. Cont'l Pet Techs., Inc.*, 2006 U.S. Dist. LEXIS 70287, 19-20 (E.D. Ky. *decided*

September 26, 2006), applied a modified *McDonnell Douglas* test in a Title VII case involving a RIF. The district court relied on Sixth Circuit precedent to find that a modified test should be used. Specifically, the district court ruled that, in a reduction in force case, the fourth prong is modified and the plaintiff must instead submit "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Id.*, at *20 (citing *Rowan*, 360 F.3d at 548).

Then, earlier this month, the Northern District of Ohio decided in *Vehar v. Cole Vision Corp.*, 2006 U.S. Dist. LEXIS 72978 (N.D. Ohio *decided* October 5, 2006), that "the *McDonnell Douglas* framework used to analyze discrimination claims 'changes in the context of a work force reduction.'" *Id.*, at *37 (citing *Barnes*, 896 F.2d at 1465 n.1). The district court explained that in a RIF case "the fourth element of *McDonnell Douglas* is modified because the employer does not replace the employee with someone outside the protected class. *Id.* (citing *Godfredson*, 173 F.3d at 371). The district court found that a RIF situation occurs when, "business considerations cause an employer to eliminate one or more positions within the company." *Id.* The district court followed Sixth Circuit precedent and held that prong was modified to require that the plaintiff present "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Id.*, at *38 (citing *Godfredson*, 173 F.3d at 371).

All of the above district court cases applied a standard that is directly opposite of that employed by the Western District of Michigan in deciding the case at bar. These recent cases directly conflict with a rigid application of the *McDonnell Douglas* test, a standard that was applied by the Sixth Circuit

in Mr. Merrill's case, and demonstrate that a continued conflict exists about the application of the McDonnell Douglas burden-shifting test in discriminatory discharges occurring during a RIF. The cases also emphasis the fact that a change in law has occurred, and it occurred during the pendency of Mr. Merrill's appeal on this issue.

As can be seen from all of the cases discussed above, the Sixth Circuit Court of Appeals and the lower District Courts of the Sixth Circuit have more recently applied a modified *McDonnell Douglas* test in a RIF situation and, as such, it is now the precedent in the Sixth Circuit. This change in the law merits further review by this Court. If nothing else, cases decided by the Sixth Circuit Court of Appeals and district courts within the Sixth Circuit both before and after the decisions rendered in Petitioner Merrill's case are in direct conflict with each other. Such varied applications of *McDonnell Douglas* and such a wide divergence in holdings shows that the Sixth Circuit is internally conflicted on this point, substantiating the need for clarification. For all of these reasons, Mr. Merrill's Petition for rehearing should be granted not only because of the change in the law, but also because the Sixth Circuit has inconsistently applied the *McDonnell Douglas* test in the RIF context, leading to conflicting results based on differing legal standards.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that his Petition for Rehearing be granted.

As an alternative to this Court granting a Petition for Rehearing, Petitioner respectfully requests that this case be remanded to the Sixth Circuit Court of Appeals for reconsideration in light of the recent cases decided in that Circuit, which have been cited in this petition, regarding a modified RIF analysis.

Respectfully submitted,

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Date: October 27, 2006

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Certification of Counsel (Rule 44)

As counsel for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay.

Dated: October 27, 2006

Robert J. Eleveld

Robert J. Eleveld
Counsel for Petitioner